# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 44

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE STATE OF TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, SECOND JUDICIAL DISTRICT, STATE OF TEXAS

PETITION FOR CERTIORARI FILED MARCH 31, 1941
CERTIORARI GRANTED MAY 12, 1941

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1940

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## No. —

## THE UNITED STATES OF AMERICA, PETITIONER

vs.

## STATE OF TEXAS ET AL.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

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7 In the 124th District Court of Gregg County, Texas

No. 2394–B

M. R. INGRAM

*vs.*

W. L. NIX ET AL.

*Plaintiff's original petition*

Filed Nov. 20, 1933

*To the Honorable Judge of Said Court:*

Now comes M. R. Ingram, hereinafter styled plaintiff, complaining of W. L. Nix and Heartfield Refining Company, Inc., hereinafter styled defendants, and for cause of action allege and stand ready to verify the following:

I

Plaintiff resides in Gregg County, Texas.

Defendant, W. L. Nix, resides in Gregg County, Texas, and operates his refining business under the trade name of Texas Refinery. Heartfield Refining Company, Inc., is a corporation organized under and pursuant to the laws of the State of Texas, having maintained its office and principal place of business in Kilgore, Gregg County, Texas.

II

On the 11th day of May 1933 defendant, Heartfield Refining Company, Inc., acting by and through its President, C. A. Heartfield, executed and delivered to plaintiff its promissory note, bearing date on such day and year, thereby promised plaintiff to pay him, or his order, on demand after date, the sum of Eleven Hundred Three and 49/100 ($1,103.49) Dollars, with 8% interest from date until paid, and 10% attorneys' fee upon principal and

8 interest if placed in the hands of an attorney for collection or suit should be brought thereon, after maturity, which said note was secured by a chattel mortgage upon the following described property, to wit: Six 250-barrel run-down tanks, one 1,000-barrel storage tank, which property was situated at that time on the site of the Heartfield Refining Company, Inc., on the outskirts of Kilgore, Gregg County, Texas.

III

Plaintiff, being from such date to the present date the legal owner and holder of such note, on the 15th day of November 1933 made demand of defendants to pay the same, and defendants, refusing, placed such note after demand in the hands of the undersigned attorneys for collection, agreeing with them to pay them the said amount of attorneys' fees for his services in connection with such note, which is a reasonable amount therefor.

IV

Though repeated demands have been made by plaintiff upon defendants to pay such note, interest, and attorneys' fees, the defendants have failed and refused, and still fail and refuse, to pay the same, or any part thereof, to the plaintiff's damage in the sum of Fifteen Hundred and No/100 ($1,500.00) Dollars.

V

Plaintiff says that the above-mentioned tanks were erected for and used by defendant, Heartfield Refining Company, Inc., in the operation of its oil-refining plant near Kilgore, Gregg County, Texas.

VI

Plaintiff further says that after the execution of the afore-mentioned note and chattel mortgage, the defendant, Heartfield Refining Company, Inc., sold and delivered the above-described tanks, together with said refinery to W. L. Nix, and in said bill of sale, and as a part of the consideration therefor, the said W. L. Nix assumed and agreed to pay all outstanding debts then owed by Heartfield Refining Company, Inc., which debts included the aforementioned note, whereby the said W. L. Nix became bound, obligated, and promised to pay the said note and to discharge the said chattel mortgage, according to their face tenor and effect. Since that time, the said W. L. Nix has been in possession of said tanks and said refinery, using and operating said refinery under the trade name of Texas Refinery, and has exercised possession and dominion over said tanks.

VII

Plaintiff says that he has made demand of W. L. Nix for payment of said note, and the said W. L. Nix refusing, he then made demand for delivery and possession of the security therefor, to wit,

the afore-mentioned tanks, and the said W. L. Nix has failed and refused, and still fails and refuses to pay said indebtedness and further fails and refuses to deliver up to plaintiff the security therefor, to wit, the afore-mentioned tanks.

## VIII

Plaintiff further says that the said W. L. Nix is wholly insolvent and unable to pay said account, and owns no other property or assets in the State of Texas subject to execution, save and except the afore-mentioned refinery, which plaintiff alleges is heavily encumbered with liens and debts which constitute prior liens and encumbrances and is subjected to the satisfaction of liens which are prior to that of plaintiff, that the total assets of the defendant, W. L. Nix, would be insufficient to satisfy them, and that the mortgaged property is in danger of being materially injured, and that the conditions of the mortgage have not been performed and the value of the property is insufficient to discharge the mortgage debt, and the value of the whole of said property used and operated as Texas Refinery is probably insufficient to discharge the liens which are prior to the mortgage of this plaintiff, and further says that said tanks, above described, are not used for a separate purpose, but the use thereof is made as a part of the use and operation of the said refinery as a unit.

## IX

Plaintiff further says that the said W. L. Nix is insolvent and unable to meet his obligations as they mature.

## X

Plaintiff would further show unto the Court that an extreme emergency exists for the immediate appointment of a receiver herein without notice in order that the assets securing the plaintiff's debt be not lost but preserved, and that unless said receiver is appointed, plaintiff fears and alleges that the assets of the defendants will be dissipated, injured, and lost to plaintiff.

Wherefore, premises considered, plaintiff prays that each of the defendants be cited to appear and answer herein and, on final hearing hereof, he have judgment for his debt in the sum of Eleven Hundred Three and 49/100 ($1,103.49) Dollars, with interest thereon from date thereof until date of judgment at the rate of 8% per annum, for 10% attorneys' fees on the whole thereof, together with interest on said judgment from date

thereof until paid at the rate of 8% per annum, for costs of suit, and that his chattel mortgage be established and foreclosed, and that he have his order of sale and writ of possession. Pending such time plaintiff prays that this Court forthwith appoint some competent person as receiver over the whole of the property of defendant, W. L. Nix, now being operated and conducted under the trade name of Texas Refinery, giving and granting to such receiver the appropriate power and authority to operate or lease same as the court may deem expedient and subject to the further orders of this Court.

LEE, PORTER & LATHAM,
*Attorneys for Plaintiff.*

[*Duly sworn to by M. R. Ingram; jurat omitted in printing.*]

12 In District Court of Gregg County

[Title omitted.]

*Order appointing receiver*

Filed November 20, 1935

On this 20th day of November 1933, came on to be considered by the Court the application of M. R. Ingram for the appointment of a receiver over the property of W. L. Nix, which is known as Texas Refinery, situated at Kilgore, Gregg County, Texas, and the plaintiff appearing by counsel and the defendant having appeared, and plaintiff having announced ready on his application; the court having read the verified oath of complaint and hearing the statement and admissions in open court, is of the opinion and finds that the same presents the proper case authorizing the appointment of a receiver, ex parte, and for granting the relief shown in this order.

It appearing to the court that J. G. Strong is duly qualified under the law; he is hereby appointed Receiver over all and singular the property of the defendant, W. L. Nix, known as Texas Refinery, including all and singular the real and personal property used in connection therewith, and that he take immediate possession and charge over all the properties, assets, books of account, contracts and documents of Texas Refinery, with full authority to carry on and conduct the business of such company, and to that end receive rents, accounts, compound for, compromise demands and bring suits, and in general to manage the property, or if in the opinion of the receiver, he shall be and is hereby

authorized to lease said plant upon the best terms and con-
13 ditions available, subject to the approval of the court; that he be authorized to make purchases of crude petroleum, make sales of the refined productions, to collect therefor and to hold the proceeds arising from such operation subject to the orders of this court, except so much thereof as may be necessary to conduct such operations.

That the said W. L. Nix, his agents and employees, are required and commanded forthwith to surrender to such receiver on demand, all books of account, minute books, records, and property of any and every description belonging or pertaining to the business of Texas Refinery to be kept in the custody of such receiver subject to the order of this court.

That such receiver before entering on his duty shall execute a bond in the sum of $2,500.00, according to law, to be approved by this court, and shall return and file with the court, within twenty (20) days from this date a full and complete inventory of all the property of the defendant, operated as Texas Refinery over which he is hereby ordered to take charge and control as receiver, together with a list of the assets and liabilities.

That the said W. L. Nix, his agents and employees, are hereby enjoined from in any way interfering or intermeddling with the property hereby directed to be turned over to said receiver, or from hindering or molesting him in any way while acting as such receiver, and from disposing of said property, except to transfer and turn same over to such receiver subject to the orders of this court, and hearing on a contest in any hereof is set for Nov. 25, 1933, at 9:00 A. M.

WILL C. HURST,
*Judge of the 124th District Court*
*of Gregg County, Texas.*

14 In District Court of Gregg County

[Title omitted.]

*Intervention of R. P. Ash*

Filed November 21, 1933

Now comes R. P. Ash, intervener in the above-entitled and numbered cause, and, with leave of court first had and obtained, files this his petition in intervention, and thereby, complaining of M. R. Ingram, W. L. Nix and Heartfield Refining Company, Inc., parties to the above-entitled and numbered cause and would respectfully show:

I

That heretofore, to wit, on the 20th day of November 1933, the above-entitled and numbered suit was filed wherein M. R. Ingram is plaintiff, and W. L. Nix and Heartfield Refining Company, Inc., are defendants, wherein the plaintiff has sued the defendants and is seeking a judgment against them for his debt in the sum of One Thousand One Hundred Three and 49/100 ($1,103.49) Dollars, together with interest thereon and attorneys fees and for costs of suit and for foreclosure of his chattel mortgage lien on certain property set out in his original petition on file herein and for the appointment of some competent person as Receiver over the whole of the property of the defendant, W. L. Nix, now being operated under the trade name of Texas Refinery; that pursuant to the filing of said petition and application for the appointment of a Receiver, this Honorable Court did on the 20th day of November 1933, appoint J. G. Strong, Receiver, setting his bond at the sum of Twenty-five hundred ($2,500.00) Dollars; that the said J. G. Strong has qualified as such Receiver and has entered into possession of the property of the said W. L. Nix, being operated and conducted under the trade name of Texas Refinery, at Kilgore, Texas.

II

That your intervener has an interest in the matter in controversy in the above-entitled and numbered cause and has a cause of action against the defendants, W. L. Nix and Heartfield Refining Company, Inc., in that heretofore, to wit, on or about April 27, 1933, the Heartfield Refining Company, Inc., made, executed, and delivered to R. W. Porter its certain promissory note in the sum of Seventeen Hundred Fifty and No 100 ($1,750.00) Dollars, payable in two equal installments of Eight Hundred Seventy-five and No 100 ($875.00) Dollars each, due respectively on June 1, 1933, and July 1, 1933, said note bearing interest from date at the rate of eight (8%) percent per annum and containing the usual ten (10%) percent attorney's fee clause; that thereafter, to wit, on August 26, 1933, the said R. W. Porter, the owner and holder of said above-described note, for valuable consideration, sold, transferred, and delivered same, together with all rights and liens securing it, to intervener who is now the owner and holder of said note and lien.

III

That said above described note in the sum of Seventeen Hundred Fifty and No 100 ($1,750.00) Dollars is secured by a chattel mortgage lien on the following described property, to wit:

All of the Refinery equipment and the leasehold estate owned by Heartfield Refining Company, situated on the 3-acre Heartfield Refining Company, Inc., site in the Mary Van Winkle Survey in Gregg County, Texas, save and except Six (6) 250
16 barrel run down tanks and one (1) 1,000 barrel crude storage tank located thereon, which said chattel mortgage was executed by the Heartfield Refining Company, Inc., acting by and through its President, C. A. Heartfield, on or about April 27, 1933, and filed for registration with the County Clerk of Gregg County, Texas, on the 6th day of May A. D. 1933, and duly registered by said County Clerk under File No. 1889; that chattel mortgage constitutes a valid, outstanding first and superior lien on the property described therein.

IV

That thereafter the defendant, W. L. Nix, purchased all of the refinery equipment of the Heartfield Refining Company, Inc., and, as a part of the consideration therefor, assumed and agreed to pay the above-described note held by your intervener, whereby the said W. L. Nix became bound, obligated, and promised to pay said note and to discharge said chattel mortgage lien according to their face, tenor, and effect

V

That your intervener has made demand for the payment of the above-described note and for the delivery to him of the equipment against which he holds the above-described chattel mortgage lien; that said defendants have wholly failed and refused and still fail and refuse to pay said note; or to deliver to your intervener the said refining equipment, to intervener's damage in the sum of Twenty-five Hundred and No/100 ($2,500.00) Dollars.

VI

Intervener would further show that on or about September 19,
1933, the defendant, W. L. Nix, for value received, made,
17 executed, and delivered to intervener his certain promissory note in the sum of Four Thousand Six Hundred Fifty-one and 86/100 ($4,651.86) Dollars, payable on demand and bearing interest at the rate of eight (8%) percent per annum from date, and containing the usual clause providing for the payment of an additional ten (10%) percent on both principal and interest as attorney's fees, if placed in the hands of an attorney for collection, or if collected by suit; that said indebtedness note is secured by a chattel mortgage lien on the following described property be-

longing to the defendant, W. L. Nix, doing business as the Texas Refinery, to wit:

| | |
|---|---|
| 1—1,500 bbl. capacity Pipe & Still | $788.14 |
| Wood Cooling Tower | 484.75 |
| Laboratory—Building & Equipment | 141.62 |
| Pipe & Equipment in Water Well | 157.35 |
| 2,000 bbl. capacity Bubble Tower | 3,000.00 |
| Bath House & Equipment | 30.00 |
| Office Equipment—Typewriter & Filing Cabinets | 50.00 |
| | 4,651.86 |

Which said chattel mortgage was executed on September 19, 1933, and filed for Registration with the County Clerk of Gregg County, Texas, September 30, 1933, at 3 o'clock P. M., and duly registered by said County Clerk under File 5425, which said chattel mortgage is a valid, outstanding first and superior lien on the property described herein.

VII

That intervener is the owner and holder of the said above-described note in the sum of Four Thousand Six Hundred Fifty-one and 86/100 ($4,651.86) Dollars and said chattel
18 mortgage lien securing the same, and has made demand on the said W. L. Nix for the payment of said note or the delivery up to him of the property described in said chattel mortgage, but the said W. L. Nix has wholly failed and refused and still fails and refuses to pay said note, or to deliver to intervener the said above-described property, to intervener's damage in the sum of Six Thousand and No/100 ($6,000.00) Dollars.

VIII

That intervener has been compelled to place said notes in the hands of his attorney, whose name is undersigned, and has agreed to pay him the ten (10%) percent attorney's fee provided for in said above-described notes, which is a reasonable fee.

IX

That the property described in each of the foregoing chattel mortgages owned by intervener is a part of the property and equipment taken over by your Receiver herein as the property of W. L. Nix, doing business as the Texas Refinery, and some of it is attached to the property described in the petition of the said M. R. Ingram; that the property described in the said petition and that encumbered by intervener's liens comprise the entire business unit operated as the Texas Refinery.

X

That intervener's chattel-mortgage liens as above described and set out are first and superior liens on the property described in said chattel mortgages and are of insufficient value to discharge
19 in full the indebtedness due intervener and represented by the notes above described.

Wherefore, premises considered, intervener prays that he be allowed to intervene in said suit entitled M. R. Ingram vs. W. L. Nix et al., No. 2394-B on the docket of this court; that he have judgment against the defendant, W. L. Nix, for the amount of his debt, interest, attorney's fees, and costs of suit, and for the foreclosure of his chattel-mortgage lien on the property above described, and that said judgment have priority of payment over any judgment rendered in said cause insofar as the application of the proceeds from the sale of the above-described property to which intervener's lien attaches is concerned; that your Receiver heretofore appointed be authorized to discharge intervener's debt and lien in accordance with the priority prayed for in this petition; that in case the Receiver herein appointed is allowed to operate or lease said refinery pending a final hearing in this cause said Receiver be ordered to pay to intervener ratably the proceeds of such operation or lease to be applied on the indebtedness and notes due this intervener, and for such other and further relief at law or in equity, special and general, to which intervener may show himself entitled.

CAMPBELL & LEAK
*Attorney for Intervener.*

20 In District Court of Gregg County

[Title omitted.]

*Plea in Intervention of State of Texas*

Filed December 16, 1933

*To the Honorable Judge of Said Court:*

Now comes the State of Texas, represented herein by and through its duly elected, qualified, and acting Attorney General, James V. Allred, at the special instance and request of the Comptroller of Public Accounts of the State of Texas, George H. Sheppard, and leave of the Court having first been had and obtained, files this, its plea in intervention, complaining of W. L. Nix, defendant in the above entitled and numbered cause, and respectfully shows unto the Court:

I

That the defendant, W. L. Nix, while trading and doing business as the Texas Refinery, was engaged in the business of wholesale dealer and distributor of motor fuel, as defined by the Acts of the 41st Legislature, second called session, Chapter 88, and as amended at the regular session of the 42nd Legislature, Chapter 98 of said Acts, and by the Acts of the 43rd Legislature, Chapter 44, Page 75; that as such wholesale dealer and distributor of gasoline and motor fuel and selling gasoline and motor fuel at wholesale as defined in said Act in intrastate commerce in this State, said defendant became bound and liable to pay to the State of Texas on each gallon of gasoline distributed, sold, or used, a sum equal to four cents per gallon on all gasoline and motor fuel so sold, distributed, or used during the time that the
21 said defendant was operated as a distributor of gasoline and motor fuels in this State, and while trading and doing business under the firm name of the Texas Refinery.

II

That said tax was due and payable at the office of the Comptroller on or before the 20th day of each month, based on sales made during the calendar month next preceding; that said defendant, W. L. Nix, doing business as the Texas Refinery, was required on or before the 20th day of each month to make and deliver to the Comptroller of Public Accounts a sworn statement, giving the exact number of gallons of gasoline and motor fuel sold, used, or distributed by said defendant at wholesale in intrastate commerce in this State during the next preceding month and was also required to accompany said report with a remittance in a sum equivalent to four cents per gallon on gasoline and motor fuel, sold, used, or distributed at wholesale, and for failure to pay such tax on the due date; said defendant became bound and liable to pay to the State of Texas penalty of ten percent on the amount of the tax due, together with interest thereon at the rate of eight percent per annum from said due date until paid.

III

Your intervener would further show unto the Court that the said defendant sold, used, and distributed at wholesale as defined by law 721,754 net gallons of gasoline on which said defendant became bound and liable to pay to the State of Texas an occupation tax, a sum equal to four cents per gallon on each gallon so sold, amounting to the sum of $28,870.16; that said defendant

wholly failed and refused to pay said tax on its due date, and by reason thereof became bound and liable to pay to the State of Texas an additional sum of ten percent on the amount of
22 said tax as penalty for such failure to pay on said due date, together with ten percent interest on the amount of taxes and penalties from due date until paid.

IV

That although often requested, defendant has wholly failed and refused, and still fails and refuses, to pay any of said amount, which amounts aggregate the total sum of $30,796.71; that said total amount is still outstanding, due, and unpaid.

V

That by the provisions of said law this intervener has a first superior and preferred lien upon all of the property of said defendant, W. L. Nix, trading and doing business under the firm name of Texas Refinery, used in its business as a distributor of gasoline, for all delinquent taxes, fines, penalties, and interests and costs due by said defendant to the State of Texas; said lien is the first and prior lien to all other existing liens and on all the property of said defendant which was devoted to or used in his business as a distributor, and which property includes all refinery properties, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles, and any and all other properties devoted to such use, and each tract of land on which such refinery, blending plant, tanks, or other properties are located or which is used in carrying on such business; that said defendant has been by this Honorable Court placed in the hands of a receiver; that said receiver will file in this cause an inventory and look over all the property used by said defendant in his business as a distributor of gasoline, and your intervener alleges that it has a
23 lien on all of such property securing the payment of the hereinabove alleged delinquent gasoline and motor fuel occupation taxes.

Wherefore, premises considered, intervenor prays the Court that this, its plea in intervention, be ordered filed herein and that on final hearing hereof it have its judgment establishing its debt against W. L. Nix, and that its lien against all the hereinbefore mentioned property be adjudged to be a first, prior, and superior lien, and that the same be foreclosed; that all of said property be ordered sold and the proceeds of such sale applied on such debt, principal, interest, costs of suit, and for such other and further

relief, general and special, legal and equitable, to which it may show itself justly entitled.

JAMES V. ALLRED.
James V. Allred,
*Attorney General of Texas.*
WILLIS E. GRESHAM.
Willis E. Gresham,
*Assistant Attorney General.*
R. G. WATERS.
R. G. Waters,
*Assistant Attorney General.*

36 In District Court of Gregg County

*Proof of claim for taxes due the United States*

Filed July 13, 1935

ATC: SLM: MFE. JULY 10, 1935.

IN RE M. R. INGRAM

*vs.*

W. L. NIX ET AL.

No. 2394–B In Receivership

CLERK OF THE 124TH JUDICIAL DISTRICT COURT
OF GREGG COUNTY,
*Longview, Texas.*

SIR: On or about December 30, 1933, and January 12, 1934, there were forwarded to you Government proofs of claim in the respective amounts of $20,907.61 and $600.50 for filing in the above-styled case. These claims represent taxes due the United States by Texas Refinery, Kilgore, Texas, for the months of May to November 1933, inclusive, as imposed by Section 617 (a) of the Revenue Act of 1932 on the sale of gasoline.

There is attached hereto an amended proof of claim in the amount of $19,914.81 for filing in the above-styled case. This claim represents gasoline taxes for the period as set forth above due the United States by the Texas Refinery, W. L. Nix, Owner, of Kilgore, Texas, and is a consolidated of the two claims formerly filed. The new claim represents the present indebtedness of this taxpayer as reflected from the records of this office and is filed as an amendment to rather than a replacement of the claims formerly filed and without prejudice to priorities of time established heretofore.

A copy of the proof of claim is also transmitted with the request that you acknowledge receipt of the original thereof by signing on the space provided therefor at the foot of the
37 copy.

Respectfully,

(Signed) W. A. THOMAS,
*Collector.*

Enclosure.

Proof of Claim for Taxes Due United States of America

In the District Court of Gregg County, 124th Judicial District, Longview, Texas

No. 2394–B—In Receivership

In matter of M. R. INGRAM *vs.* W. L. NIX ET AL.

Comes now W. A. Thomas, Collector of Internal Revenue for the Second District of Texas, at Dallas, a duly authorized agent for the United States in this behalf, and states that the Texas Refinery, W. L. Nix, Owner, of Kilgore, Texas, is justly and truly indebted to the United States of America for internal-revenue taxes as follows:

Internal Revenue Taxes as imposed by Section 617 (a) of the Revenue Act of 1932, as amended, on the sale of gasoline by the producer or importer thereof, legally due and owing, as follows:

| | |
|---|---|
| May 1933: | |
| Tax | $480.40 |
| Interest | 31.71 |
| | 512.11 |

Plus interest at the rate of 6% per annum from January 6, 1934, to date of payment.

38 June 1933:

| | |
|---|---|
| Tax | $1,036.11 |
| 25% penalty | 259.03 |
| Interest | 43.17 |
| | 1,338.31 |

Plus interest at the rate of 6% per annum from January 6, 1934, to date of payment.

| | |
|---|---|
| July 1933: | |
| Tax | 949.81 |
| 25% penalty | 237.45 |
| Interest | 30.08 |
| | 1,217.34 |

Plus interest at the rate of 6% per annum from January 6, 1934, to date of payment.

| | | |
|---|---|---|
| August 1933: | | |
| Tax | | $2,488.88 |
| Interest | | 53.93 |
| | | 2,542.81 |
| Plus interest at the rate of 6% per annum from January 6, 1934, to date of payment. | | |
| September 1933: | | |
| Tax | | 3,014.56 |
| Interest | | 70.34 |
| | | 3,084.90 |
| Plus interest at the rate of 6% per annum from October 31, 1933, to date of payment. | | |
| October and November 1933: | | |
| Tax—October $6,717.87 | | |
| November 4,397.25 | | 11,115.12 |
| Interest | | 104.22 |
| | | 11,219.34 |
| Plus interest at the rate of 6% per annum from December 31, 1933, to date of payment. | | |
| Total amount due excluding unassessed accrued interest | | 19,914.81 |

That no part of said taxes, interest, or penalties has been paid but the same are now due and payable at the office of said Collector, and no security therefor is held by the United States nor are there any off-sets or counterclaims to same.

That this claim is entitled to priority in payment and attention is called to section 64 (a) of the Bankruptcy Act and section 3466 of Revised Statutes of the United States, which direct priority in payment of taxes due the United States over other claims, and to the provisions of section 3467, Revised Statutes of the United States, as amended by section 518 of Revenue Act of 1934 imposing personal liability upon an executor, administrator, assignee, trustee or other person who, in paying debts of the person or estate for whom or for which he acts, fails to observe the priority in payment prescribed by statute in favor of the United States.

Dated at Dallas, Texas, this the 8th day of July A. D. 1935.

W. A. THOMAS,
*Collector of Internal Revenue,*
*Second District of Texas.*
By S. L. MAYO,
*Deputy Collector.*

*[Duly sworn to by S. L. Mayo; jurat omitted in printing.]*

66 In the District Court of Gregg County, in Chambers

[Title omitted.]

*Order approving final report and discharging receiver*

Filed November 5, 1935

On this the 5th day of November, A. D. 1935, came on to be considered the final report and accounting of J. G. Strong, Receiver, heretofore appointed in the above-entitled and numbered cause, and it appearing to the Court that said report has been on file for ten (10) full days and that proper notice of said filing has been given to all interested parties; and, the Court having carefully examined the same and finding that all of the assets of said Estate have been converted into cash, amounting to the sum of $7,516.92, which said sum has been paid into the registry of this Court, and that there is no further necessity for a continuation of said Receivership, is of the opinion that said Receivership should be closed and the Receiver should be discharged from any further duties and liabilities, and that the sureties on his official bond, as Receiver, should also be discharged;

It is, therefore, ordered and decreed by the Court that said final report and accounting of said Receiver be, and the same is hereby, in all things, approved and ordered filed among the papers of this cause and that the said J. G. Strong, as Receiver, be, and he is hereby, discharged from all further duties and liabilities of said Receivership; and, it further is ordered that the sureties on the official bond of such Receiver be, and they are hereby, discharged from any and all liabilities under and by virtue of said bond.

WILL C. HURST.
*Judge of the 124th Judicial District of Texas.*

67 In District Court of Gregg County

[Title omitted.]

*Plea of intervention of Howard Dailey*

Filed Jan. 5, 1938

To the Honorable CLARENCE E. MCGAW, *Judge of Said Court:*

Now comes Howard Dailey, hereinafter called intervenor, and leave of the Court having been first had and obtained, files this,

his plea of intervention in this cause, and for cause of action, would show to the Court:

1. That heretofore, to wit, on the 20th day of November, A. D. 1933, M. R. Ingram brought this suit against W. L. Nix in person and against W. L. Nix Trading as Texas Refinery, and upon the said M. R. Ingram's petition, of even date with the filing of said suit, this Honorable Court appointed J. G. Strong receiver for said Texas Refinery, who immediately qualified and took charge of said Texas Refinery, and same was operated by said receiver until on or about November 5th, A. D. 1935.

2. That on or about said date of November 5th, 1935, pursuant to an order theretofore issued out of this Court, an order of sale was approved for the sale of said Texas Refinery, which said properties were sold for, and brought, approximately the sum of $7,516.92; that upon said sale, and the winding up of the affairs of the receivership estate, the said receiver paid into this Court on November 5th, 1935, the said sum of $7,516.92, and allowed said receiver a fee of $50.00 out of this sum, in addition to fees theretofore paid to him, leaving a balance of $7,466.92, which said sum is still in the registry of this Court.

68 3. That during the progress of this litigation, R. P. Ash filed his plea of intervention herein, alleging that the receivership estate owed him approximately the sum of $6,700.00, for which he had a mortgage of record against said Texas Refinery and its properties and assets.

4. That on or about December 21st, 1936, the said W. L. Nix, for valuable consideration, by his assignment in writing, sold, assigned, and conveyed to intervenor all his rights, titles, and interests in and to said sum of $7,466.92, now in the registry of this Court, and intervenor thereby acquired whatever interest then held and owned by the said W. L. Nix.

5. That on or about 12th day of July, A. D. 1937, by his assignment in writing, the said R. P. Ash sold, assigned, and conveyed unto intervenor all his rights, titles, and interests in and to said sum of money so held in the registry of this Court, and as a part of said assignment, subrogated and passed to intervenor all rights, of prior claim, mortgage, and liens, and by reason thereof, intervenor is now the owner and holder of all interests so held by the said R. P. Ash.

6. That subsequent to the filing of this suit, and before the filing of this plea of intervention, and before any of said sums of money so paid into the registry of this Court, M. R. Ingram formed a partnership with J. R. Stegall, under the firm

69 name of Ingram & Stegall, and all interests in this suit, together with all interests in the money so paid into the registry of this Court as aforesaid, was transferred to said partner-

ship of Ingram & Stegall, and on September 13th, 1937, by telegraphic assignment, said Ingram & Stegall sold, assigned, and conveyed unto intervenor all their rights, titles, and interests in and to said sum of money so held in the registry of this Court, and by reason of said assignment, intervenor became the owner of all rights, titles, and interests of the M. R. Ingram claim in said sum of money so held in the registry of this Court.

7. Intervenor says that if other claims have been filed herein, or intervenors appeared, that such claims and interventions are fictitious, without merit, and that, in addition to the claims acquired by intervenor, as above set out, now owned and held by him, that there are no further claims, liabilities, or valid claimants to said sum, with the exception of what Court Costs that have or will accrue herein, and says that he is entitled to said sum of money, to wit, $7,466.92, less Court Costs.

Wherefore, premises considered, intervenor prays that he be allowed to intervene in this cause, and that he have an order from this Honorable Court directing the District Clerk to so pay to the said intervenor said sum of $7,466.92, less Court Costs accrued and to accrue herein, and for such other and further relief,
70 special and general, both in law and in equity, to which he may show himself justly entitled.

HOWARD DAILEY, *Intervenor.*

[*Duly sworn to by Howard Dailey; jurat omitted in printing.*]

IN CHAMBERS, *January 5th, 1938.*

The foregoing petition in intervention having been presented to me, same is ordered filed and hearing on said intervention is set for Friday, January 14th, 1938, at 9:00 A. M.

It is further ordered that notice of said Hearing be given to all interested parties.

CLARENCE E. McGAW.
*Judge of the 124th District Court.*

71 In District Court of Gregg County

[Title omitted.]

*First amended original plea of intervention of Howard Dailey*

Filed Jan. 21, 1938

*To the Honorable Judge of Said Court:*

Now comes Howard Dailey, and with leave of the Court first had and obtained, files this, his First Amended Original Plea of Intervention, and, complaining of plaintiff, M. R. Ingram,

defendant, W. L. Nix, and all other parties herein, whether plaintiffs, defendants, or intervenors, and respectfully shows the Court as follows, to wit:

That the intervenor, Howard Dailey, is a resident of Dallas County, Texas, and the residence of the other parties herein is as alleged in their pleadings herein.

That on the 19th day of September 1933, the defendant, W. L. Nix, doing business as Texas Refinery, executed and delivered to R. P. Ash his promissory note, bearing date on such day and year, and thereby promised R. P. Ash to pay him, on demand, the sum of $4,651.86, with 6% interest per annum thereon from said date, and 10% attorneys fees upon principal and interest if placed in the hands of an attorney for collection, or suit should be brought thereon after maturity. Your intervenor does not know where said note is, and intervenor alleges that he does not how have nor has he ever had possession of said note, but is

72 prepared to and will offer secondary evidence of the contents thereof and of the execution and delivery of same as in this petition set out and alleged.

Upon the 19th day of September 1933, the defendant, W. L. Nix, doing business as Texas Refinery, executed and delivered to the said R. P. Ash his chattel mortgage whereby he granted, sold, and conveyed to R. P. Ash the following described property to secure the payment of the above described note, to wit:

1 1,500 barrel-capacity pipe still; water cooling tower; laboratory building and equipment; pipe and equipment in water well; 2,000 barrel-capacity Bubble Tower; bathhouse and equipment; office equipment, typewriter, and filing cabinets; being all of the equipment, fixtures, machinery, and appurtenances pertaining to, used in connection with, or in any way incident to the Texas Refinery. Said chattel mortgage created a prior and subsisting lien, which is still subsisting, against such property to secure the payment of such note, and all amounts due thereon, and a certified copy of such chattel mortgage is hereto attached, marked Exhibit "A" and made a part hereof, and here referred to and adopted for all intents and purposes; which chattel mortgage was duly filed for record on the 20th day of September 1933, in the office of the County Clerk of Gregg County, Texas, recorded in Volume 38, page 31, of the Chattel Mortgage Records thereof, to which record reference is here made.

That during the progress of this litigation, the said R. P. Ash filed his plea of intervention herein, as will be more fully shown by his plea so filed herein, which plea of intervention alleged that the receivership estate and the said W. L. Nix, doing business as Texas Refinery, owed him approximately the sum of

73 $4,651.86, plus interest at the rate of 6% per annum from the 19th day of September 1933, and 10% upon both principal and interest as attorney's fee, all of which is more fully evidenced by the above-described note, which plea further alleged the execution of said chattel mortgage by the said W. L. Nix, doing business as Texas Refinery, and against its properties and assets.

That on or about the 12th day of July, A. D. 1937, in consideration of the sum of $1.00 and other good and valuable considerations, and for a valuable consideration, then paid and delivered to him by your intervenor, the said R. P. Ash transferred and assigned to your intervenor all his rights, title, and interest in and to the moneys held in the registry of this court, and as a part of said assignment assigned and conveyed to your intervenor all rights, title, and interest which the said R. P. Ash owned or claimed in and to the moneys derived from a sale of the property in the hands of the Receiver in the above-entitled and numbered cause, thereby conveying to your intervenor all of the prior rights, title, and interest then owned by the said R. P. Ash in and to said sum or sums of money by virtue of the execution of the above-mentioned note and chattel mortgage executed to the said R. P. Ash by the said W. L. Nix, doing business as Texas Refinery; and the said R. P. Ash thereby transferred and assigned to your intervenor his cause of action in the above-entitled and numbered suit.

Thereafter, on the — day of December, A. D. 1937, your intervenor filed his original plea of intervention in the above-entitled and numbered cause, thereby giving to the Receiver
74 herein, and all parties herein, either plaintiff, defendant, or intervenor, full and accurate notice of such transfer and assignment, and demanded thereby the payment of said note as secured by said chattel mortgage.

Your intervenor alleges that there are no just discounts or defenses against the said note.

The defendant, W. L. Nix, has at all times after such notice and after demand therefor refused and failed to make payment of such note or any part thereof, to intervenor's damage in the sum of $4,651.86, plus interest at the rate of 6% per annum from the 19th day of September 1933, and 10% on both principal and accrued interest as attorneys' fees.

Your intervenor, being now the legal owner and holder of said note and chattel mortgage, on the — day of ——, 193—, after such note was due and payable, and after having made demand for the payment of such note, placed such note, after maturity, in the hands of the undersigned attorneys for collection, agree-

ing with them to pay to them the said amount as attorneys' fees for their services in connection with such note, which is a reasonable amount therefor.

That heretofore, to wit, on the 20th day of November, A. D. 1933, M. R. Ingram brought this suit against W. L. Nix in person and against W. L. Nix trading as Texas Refinery, and upon the said M. R. Ingram's petition, of even date with the filing of the said suit, this Honorable Court appointed J. G. Strong receiver for said Texas Refinery, who immediately qualified and took charge of said Texas Refinery, and same was operated by said receiver until on or about November 5, A. D. 1935.

75 That on or about said date of November 5, 1935, pursuant to an order theretofore issued out of this Court, an order of sale was approved for the sale of said Texas Refinery, which said properties were sold for, and brought, approximately the sum of $7,516.92; that upon said sale, and the winding up of the affairs of the receivership estate, the said receiver paid into this Court on November 5, 1935, the said sum of $7,516.92, and allowed said receiver a fee of $50.00 out of this sum, in addition to fees theretofore paid to him, leaving a balance of $7,466.92, which said sum is still in the registry of this Court.

That on or about December 21, 1936, the said W. L. Nix, for valuable consideration, by his assignment in writing, sold, assigned, and conveyed to intervenor all his rights, titles, and interests in and to said sum of $7,466.92, now in the registry of this Court, and intervenor thereby acquired whatever interest then held and owned by the said W. L. Nix.

Intervenor alleges that by virtue of the execution of said note and chattel mortgage by the said W. L. Nix, doing business as Texas Refinery, and the assignment of said note, chattel mortgage, and cause of action by the said R. P. Ash to your intervenor, that your intervenor, Howard Dailey, has a claim which is prior to any other valid and subsisting claim herein, in that said note and chattel mortgage were executed to secure the said R. P. Ash for the said sum of $4,651.86, which was used by the said W. L. Nix and Texas Refinery to purchase, repair, and replace equipment of and upon and incident to said Texas Refinery, and that said chattel mortgage above mentioned was duly filed for record on the 20th day of September 1933, at 3 o'clock P. M., in the office of the County Clerk, Gregg County, Texas, and recorded in

76 Volume 38, page 31, of the Chattel Mortgage Records of Gregg County, Texas, to which record reference is here made; that all of the claims herein, other than the claim of your intervenor, were incurred subsequent to the execution and recordation of said chattel mortgage, and therefore are inferior to the

claim of your intervenor; and that if any claim of any of the intervenors or other parties accrued prior to the execution and recordation of said chattel mortgage, said purported lien or claim was not duly set up, registered, or recorded in such manner as to give notice to the said R. P. Ash, from whom your intervenor has acquired all rights, title, and interest.

Wherefore, premises considered, intervenor prays that on final hearing hereof your intervenor's claim be in all things approved and allowed, and that he be given judgment in the amount of his claim, and that his said claim be decreed a prior and superior claim and lien to all other claims of any of the parties herein, whether plaintiff, defendant, or intervenors, and that an order be entered directing payment of his said claim from the funds now held in the registry of the Court, and for his costs of suit, and for such other and further relief, general and special, to which he may show himself justly entitled, and intervenor will ever pray.

A. H. SHAW,
JAMES L. LATTIMORE,
By JAMES L. LATTIMORE,
*Attorneys for Intervenor.*

77 *Exhibit A to amended plea of intervention*

THE STATE OF TEXAS,
*County of Gregg.*

Know all men by these presents: That I, W. L. Nix, Owner of the Texas Refinery of Kilgore, County of Gregg, State of Texas, party of the first part, mortgagor, being justly indebted to R. P. Ash of Carthage, County of Panola, State of Texas, party of the second part, mortgagee, in the sum of $4,651.86, which indebtedness is hereby confessed and acknowledged, for the purpose of securing payment of said debt and interest and in consideration of the sum of One Dollar ($1.00), the receipt whereof is hereby acknowledged, has granted, bargained, sold and mortgaged, and by these presents does grant, bargain, sell, and mortgage unto said mortgagee, the following described goods, chattels, and personal property, to wit:

| | |
|---|---|
| 1 1,500 Bbl. Capacity pipe still | $788.14 |
| Water cooling Tower | 484.75 |
| Labratory-Building & Equipment | 141.62 |
| Pipe & Equipment in Water Well | 157.35 |
| 2,000 bbl. capacity Bubble Tower | 3,000.00 |
| Bath House & Equipment | 30.00 |
| Office Equipment-Typewriter & Filing Cabinets | 50.00 |
| Total | 4,651.86 |

To hage and to hold the same unto said mortgagee, said mortgagee's personal representative, successors, and assigns forever.

Provided, and these presents are upon the express condition, that if said mortgagor shall well and truly pay or cause to
78 be paid to said mortgagee said sum above mentioned, with interest thereon, in accordance with the terms of his certain promissory note bearing even date herewith, signed by said mortgagor, payable to said mortgagee or order as follows, to wit: $4,651.86 due on or before Demand $_____.

And any renewals of the same, or any part thereof, with interest thereon, together with any sum or sums advanced or that may during the life of this mortgage be advanced, or paid to, or for the account of the said mortgagor, or expended in repairing or improving said mortgaged property, and also any other indebtedness for which the undersigned may be or become liable to the mortgagee herein, either as principal, endorser, surety, or guarantor; and shall punctually and faithfully perform each, all and every of the covenants, stipulations, and agreements herein contained on his part to be performed, then this instrument shall be void, otherwise to remain in full force and effect.

Said mortgagor further promises that he will use said goods and chattels with reasonable care, skill, and caution, and keep same in good repair and under shelter, and will not use or permit them to be used for hire, and will not permit the same to be damaged, injured, or depreciated, and will not attempt to sell, assign, or dispose of said goods and chattels or any interest therein; or remove, or permit the same to be removed from the county where he resides, without the written consent of said mortgagee, and will not encumber or permit any encumbrance or lien of any character whatsoever against the same; and that he will pay all taxes that may be levied against said goods and chattels.

79 Said mortgagor further covenants and agrees to keep said goods and chattels insured against loss or damage by fire and theft; loss, if any, payable to said mortgagee as said mortgagee's interest may appear.

And in case said mortgagor shall neglect or refuse to obtain said insurance or pay such taxes as aforesaid, then said mortgagee may at said mortgagee's option obtain such insurance and pay all such taxes and assessments aforesaid; and all sums of money thus expended are hereby secured by these presents, and shall be repayable with interest upon demand from said mortgagor to said mortgagee, and may be retained by said mortgagee from the proceeds of the sale of said goods and chattels herein authorized.

In case default be made in the payment of said debt, or interest, or any of the said notes, or any extension or renewals thereof; or if any execution, attachments, sequestration, or other writ shall be levied on said goods and chattels, or if a petition for receiver or in

bankruptcy shall be filed by or against said mortgagor, or if said mortgagor shall make an assignment for the benefit of his creditors, or if said mortgagor shall fail to keep and perform any of the covenants, stipulations, and agreements herein contained on his part to be performed or if said mortgagee shall at any time deem said mortgagor, said chattels, said debt, or said security unsafe or insecure, then upon the happening of said contingencies or any of them, the whole amount herein secured remaining unpaid, is by said mortgagor admitted to be due and payable, and said mortgagee may at said mortgagee's option (notice of which option is hereby expressly waived), foreclose this mortgage by
80 action or otherwise, and said mortgagee is hereby authorized to enter upon the premises where said goods and chattels may be, and remove and sell the same and all equity of redemption of the mortgagor therein, either at public auction or private sale at Carthage, Texas, or elsewhere, without demand for performance, and out of the proceeds of said sale pay the cost of foreclosing this mortgage, and the expense of pursuing, taking, keeping, advertising, and selling said goods and chattels, including a reasonable attorney's fee, and apply the residue thereof towards the payment of said indebtedness or any part thereof, in such manner as said mortgagee may elect, rendering the surplus, if any, unto said mortgagor, his executors, administrators, and assigns upon demand.

And said mortgagee may purchase at such sales in the same manner, and to have the same effect as any person not interested herein.

This mortgage shall apply to and bind said mortgagor, his personal representatives, and assigns, and inure to the benefits of said mortgagee, said mortgagee's personal representatives, successors, and assigns.

In witness whereof the mortgagor has hereunto set his hand this 19 day of September 1933 at Kilgore, Texas.

TEXAS REFINERY,
By W. L. NIX.

Witnesses:
S. B. POPE.
GRANT GOOD.

81 THE STATE OF TEXAS.
*County of Gregg.*

Before me, the undersigned, a Notary Public in and for said County and State, on this day personally appeared Texas Refinery by W. L. Nix known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office on this the 26th day of Sept. A. D. 1933.

[L. S.] EDNA PARDUE.
*Notary Public in and for Gregg County, Texas.*

82 In District Court of Gregg County

[Title omitted.]

*Answer of Intervenor, The United States, to Plea of Intervention Filed by Howard Dailey*

Filed January 21, 1938

To the Honorable CLARENCE E. MCGAW, *Judge of Said Court:*

Now comes the intervenor, United States of America, in answer to the plea of intervention herein filed by Howard Dailey, and respectfully represents and shows to the Court:

I

The intervenor, United States, demurs generally to the plea of intervention of Howard Dailey and states that it is insufficient as a matter of law to require an answer and should be dismissed.

II

The intervenor, United States, specially further excepts to the plea of intervention of Howard Dailey and says that it is insufficient in law to require an answer for the reason that it is vague and indefinite and does not state sufficient facts which, if proven, would entitle intervenor, Howard Dailey, any judgment or relief in this proceeding.

III

The intervenor, United States, further specially further excepts to the plea of intervention of Howard Dailey as follows:

A. The intervention of Howard Dailey fails to allege that any money or other consideration of value was paid by him to R. P. Ash for the alleged assignment of his claim against W. L. Nix.

83 B. The intervention of Howard Dailey does not allege that the defendant, W. L. Nix, was or is indebted to R. P. Ash, or that said R. P. Ash had a valid claim against the defendant, W. L. Nix, and fails to allege any facts which show or tend to show that R. P. Ash has any claim against W. L. Nix and Texas Refinery.

C. The intervention of Howard Dailey fails to allege that the partnership of Ingram & Stegall had at any time a valid claim against W. L. Nix or that W. L. Nix was or is indebted to the said partnership of Ingram & Stegall, and fails to allege any facts which show or tend to show that W. L. Nix is indebted to said partnership or that the said partnership has any claim against W. L. Nix or the assets of the Texas Refinery.

IV

Answering further herein, if need be, and without abandoning any of its demurrers and exceptions, the intervenor, United States, denies all and singular the allegations in the plea of intervention of Howard Dailey and says that they are not true, either in whole or in part, and demands strict proof thereof, and of this it puts itself upon the country.

Wherefore intervenor, United States, prays that Howard Dailey be denied all relief thereunder.

STEVE M. KING,
*United States Attorney,*
By J. L. B.,
JAMES L. BACKSTROM,
*Special Attorney,*
*Bureau of Internal Revenue.*

84

V

Answering further, if need be, and without waiving any of the foregoing, and pleading the true facts, the intervenor, United States, respectfully pleads and shows to the Court that defendant is not and never was indebted to R. P. Ash, and that if intervenor is mistaken in this, that any and all indebtedness of W. L. Nix to R. P. Ash had been paid and fully discharged by W. L. Nix long prior to the filing of a plea of intervention herein by R. P. Ash, and that the defendant W. L. Nix was not indebted to R. P. Ash in any sum at the time of the filing of his plea of intervention by R. P. Ash; that intervenor Howard Dailey has paid no consideration to R. P. Ash or anyone else for the purported assignment to him and that he is not the owner of said claim or any interest R. P. Ash may have in the funds of W. L. Nix and Texas Refinery, receivership, now in the hands of this Court;

That in his plea of intervention R. P. Ash alleged that he owned two notes secured by a lien on certain property of the Texas Refinery, and that two notes totaling $1,750 had been given one R. W. Porter by the Heartfield Refining Company prior to the

acquisition of said refinery by W. L. Nix who assumed said indebtedness when he acquired the refinery, and that the said R. W. Porter transferred said notes for a valuable consideration to said intervenor, R. P. Ash, on August 26, 1933. The intervenor, United States, would respectfully show that prior to any purported assignment to R. P. Ash, that R. W. Porter had been paid in full all amounts due him by W. L. Nix and represented by
85 said notes and mortgage, and that said notes and mortgages having been satisfied, that R. P. Ash acquired no lien on any of the property of W. L. Nix and Texas Refinery by any purported assignment thereof.

The United States further respectfully shows that, on or about September 19, 1933, when intervenor R. P. Ash alleges defendant W. L. Nix executed and delivered to him a note for $4,651.86 secured by certain property of the Texas Refinery, said defendant W. L. Nix was not indebted to R. P. Ash for said sum *of* any other sum, and that the intervenor acquired no mortgage or lien by the execution and delivery to him of paper writings purporting to be a note for $4,651.86 and a mortgage to secure payment of same; and that there was no consideration received by W. L. Nix for executing and delivering such note and mortgage, if such were executed and delivered to R. P. Ash.

That if said note and mortgage were valid when purported to have been executed and delivered, that subsequently thereto in September, October, November, and December 1933, W. L. Nix paid to R. P. Ash all sums owing to him including said note and mortgage and they thus were satisfied and no longer a lien on any of the property of W. L. Nix and the Texas Refinery.

## VI

The intervenor, United States, specifically denies that the partnership of Ingram & Stegall has filed in this proceeding a petition of intervention and that W. L. Nix was or is indebted to said partnership, or that said partnership has any claim against W. L. Nix or any lien on the property taken into possession by the Receiver in this proceeding, and specifically denies that In-
86 gram & Stegall, a partnership, assigned any claim here to intervenor, Howard Dailey, and that he has interest in any claim against or interest in the funds in the hands of this Court asserted by said partnership Ingram & Stegall, or anyone else.

Wherefore, intervenor United States prays for judgment upon its demurrers and exceptions and that Howard Dailey be denied all relief sought under his plea of intervention, and prays the allowance of its claim as by law required and that its claim be

held to be prior to all other claims herein and such other and further relief, to which it might show itself justly entitled.

STEVE M. KING,
*United States Attorney.*
by J. L. B.
JAMES L. BACKSTROM,
*Special Attorney,*
*Bureau of Internal Revenue.*

[*Duly sworn to by James L. Backstrom; jurat omitted in printing.*]

87 In District Court of Gregg County

[Title omitted.]

*Answer of intervenor, United States, to petition of intervention of Intervenor R. P. Ash*

Filed Jan. 21, 1938

To the Honorable CLARENCE E. MCGAW, *Judge of said Court:*

Now comes the United States of America, intervenor in this proceeding, and in answer to the petition of intervention filed herein by R. P. Ash, intervenor, respectfully pleads and shows to the court:

I

The intervenor, the United States, demurs generally to the petition of intervention of R. P. Ash, intervenor herein, and says that the same fails to state a cause of action and should be dismissed.

II

Now comes the intervenor, United States of America, without waiving its demurrer to the plea of intervention of R. P. Ash, but still insisting thereon, and denies all and singular the allegations contained in said plea of intervention and demands strict proof thereof, and of this it puts itself upon the country.

Wherefore, intervenor, the United States, prays that the intervenor, R. P. Ash, take nothing by his suit and that the United States recover its judgment and all costs herein.

STEVE M. KING,
*United States Attorney.*
by J. L. B.
JAMES L. BACKSTROM,
*Special Attorney,*
*Bureau of Internal Revenue.*

88 III

Now comes the intervenor, the United States of America, by way of special answer and denies that the intervenor, R. P. Ash, has any interest in the matter involved in this proceeding, and denies that defendant, W. L. Nix, is indebted to intervenor, R. P. Ash, and denies that R. W. Porter for valuable consideration sold, transferred and delivered two notes of W. L. Nix and the Heartfield Refining Company, Inc. as alleged in paragraph II of the plea of intervention to R. P. Ash, and denies that R. P. Ash ever paid any consideration to R. W. Porter for said notes, and denies that R. P. Ash was the owner and holder of said note and lien. And further specifically alleges that the notes of the Heartfield Refining Company, Inc., payable to R. W. Porter, payment of which was assumed by W. L. Nix, were paid and satisfied by W. L. Nix, and alleges that any lien which may have been fixed upon any of the assets of the refinery acquired by W. L. Nix from the Heartfield Refining Company, Inc., by reason of said notes and mortgages were fully satisfied, and that said property was not subject to any lien by reason thereof at the time of the appointment of the receiver in this case.

Answering further herein the United States by way of special answer denies that on or about September 19, 1933, the defendant, W. L. Nix, made and executed and delivered to intervenor, R. P. Ash, his promissory note for $4,651.86, or any other sum. Denies that any consideration passed from intervenor R. P. Ash to W. L. Nix for the said note alleged in said intervenor's
89 petition of intervention, and denies that at that time or any time thereafter was W. L. Nix indebted to intervenor, R. P. Ash, for any sum; and denies that by reason of the chattel mortgage purported to have been executed on September 19, 1933, and filed for registration with the County Clerk of Gregg County, Texas, that R. P. Ash acquired or held any lien or mortgage against any of the property of W. L. Nix and the Texas Refinery. Intervenor further specifically denies that intervenor, R. P. Ash, was at the time of the filing of the petition of intervention the owner or holder of any valid note or mortgage of W. L. Nix.

The intervenor, the United States, further pleads and shows to the Court that in the event it should be proven that R. P. Ash held a valid note or mortgage of W. L. Nix on the property of the Texas Refinery, intervenor alleges that after the signing of said note and mortgage, if such were signed and delivered by W. L. Nix to intervenor, R. P. Ash, that W. L. Nix during September, October, November, and December 1933 paid to said intervenor, R. P. Ash, all amounts owing by him to said R. P.

Ash, including said notes, and that thereafter said defendant, W. L. Nix, was not indebted to said intervenor, R. P. Ash, for any sum whatsoever.

Wherefore, the intervenor, the United States, prays that the intervenor, R. P. Ash, his assignees, or anyone claiming through him, take nothing by their suit herein, and that the United States have its claim filed in this proceeding allowed as set out
90 in its plea of intervention, and that it be allowed priority in payment over all other claims and all costs of suit and such other and further relief, general or specific, to which it might show itself justly entitled.

STEVE M. KING,
*United States Attorney.*
by J. L. B.
JAMES L. BACKSTROM,
*Special Attorney,*
*Bureau of Internal Revenue.*

[*Duly sworn to by James L. Backstrom; jurat omitted in printing.*]

91 In District Court of Gregg County

[Title omitted.]

*Answer of intervenor, United States, to petition of plaintiff*

Filed January 21, 1938

To the Honorable CLARENCE E. MCGRAW, *Judge of said Court:*

Now comes the United States of America, hereinafter styled intervenor, and in answer to the petition of M. R. Ingram, plaintiff herein, respectfully represents and shows to the Court as follows:

I

Intervenor, the United States, demurs generally to plaintiff's petition and states that it is insufficient as a matter of law to require an answer and should be dismissed.

II

Now comes intervenor, the United States, without waiving its demurrer to plaintiff's petition but still insisting thereon, denies all and singular the allegations contained in plaintiff's petition, and demands strict proof thereof, of this it puts itself upon the country.

Wherefore intervenor, the United States of America, prays that the plaintiff take nothing by his suit, and that intervenor recover its judgment and all costs herein.

STEVE M. KING,
*United States Attorney.*
By J. L. B.,
JAMES L. BACKSTROM,
*Special Attorney,*
*Bureau of Internal Revenue.*

92 III

Now comes intervenor, the United States of America, and denies that the Heartfield Refining Company, Inc., executed and delivered to plaintiff its promissory note as alleged in the plaintiff's petition; denies that there was any consideration therefor passing from the Heartfield Refining Company, Inc., to the plaintiff; denies that the plaintiff was given a lien upon any property by the Heartfield Refining Company, Inc.; denies that the property alleged in the plaintiff's petition was owned by the defendant, W. L. Nix, and the Texas Refinery when the plaintiff's petition was filed in this case and the receiver appointed by this Court; and denies that the receiver in this proceeding took into his possession any property upon which the plaintiff held a lien, as alleged in paragraph II of plaintiff's petition.

The intervenor denies specifically the allegations of paragraphs III, IV, V, VI, and VII of plaintiff's petition, and further specifically denies that W. L. Nix in the acquisition of the refining plant from the Heartfield Refining Company, Inc., acquired any property or assets upon which the plaintiff held a lien, and denies that W. L. Nix became bound, obligated, and promised to pay the note of the Heartfield Refining Company, Inc., to the plaintiff.

The intervenor admits the allegations of paragraph VIII of plaintiff's petition that W. L. Nix is wholly insolvent and unable to pay his debts, but denies that plaintiff held a mortgage
93 on the specific property alleged in plaintiff's petition and that such property was operated and used as part of the Texas Refinery.

Intervenor admits the allegation contained in paragraph IX of plaintiff's petition.

The intervenor further admits in view of the various claims asserting liens against the property of W. L. Nix, the allegations of the plaintiff that a receiver should be appointed to take possession of the property of W. L. Nix.

Further answering herein, the intervenor alleges that the plaintiff, W. L. Nix, is indebted to the United States for gasoline taxes for which claims have been filed by W. A. Thomas, Collector of

Internal Revenue, in this proceeding, and also petition of intervention by counsel for the United States, and further alleges that W. L. Nix and the Texas Refinery was at the time of appointment of the receiver, and is at the present time, insolvent, and that the United States' claim for taxes is entitled to priority in payment over all other claims and that the United States has a lien upon all the assets of W. L. Nix including all the assets of the Texas Refinery involved in this proceeding for the taxes due the United States from the dates that the assessment lists for taxes due and owing to the United States were received by the Collector of Internal Revenue at Dallas, Texas, as set out in the claim filed in this proceeding.

Wherefore, the intervenor, the United States, prays that plaintiff take nothing by his suit herein, and that the claim of the United States for taxes be approved and that the United
94 States recover judgment in accordance with its plea of intervention herein and all costs of suit, and that the United States is entitled to priority in payment over all other claims and such other and further relief, general or special or specific as to which it might show itself justly entitled.

STEVE M. KING.
*United States Attorney.*
by J. L. B.
JAMES L. BACKSTROM,
*Special Attorney,*
*Bureau of Internal Revenue.*

[*Duly sworn to by James L. Backstrom; jurat omitted in printing.*]

95 In District Court of Gregg County

[Title omitted.]

*Answer of intervenor, State of Texas, to petition of plaintiff, M. R. Ingram*

Filed January 21, 1938

To the Honorable CLARENCE M. MCGAW, *Judge of Said Court:*

Now comes the State of Texas, hereinafter styled intervenor, and in answer to the petition of M. R. Ingram, plaintiff herein, respectfully represents and shows to the Court as follows:

I

Intervenor, the State of Texas, demurs generally to plaintiff's petition and states that it is insufficient as a matter of law to require an answer and should be dismissed.

II

Now comes intervenor, the State of Texas, without waiving its demurrer to plaintiff's petition but still insisting thereon, denies all and singular the allegations contained in plaintiff's petition, and demands strict proof thereof, of this it puts itself upon the country.

Wherefore, intervenor, State of Texas, prays that the plaintiff, M. R. Ingram, take nothing by his suit, and that the State of Texas recover its judgment for motor-fuel taxes, penalties, and interest, for foreclosure of its statutory tax lien upon the properties and estate of this receivership or the proceeds therefrom, and that such lien be decreed a paramount preferred lien to any and all liens, claims, or rights asserted herein, all as more specifically prayed in its petition of intervention herein.



WM. MCCRAW,
*Attorney General of the State of Texas.*
PAT M. NEFF, JR.,
*Assistant Attorney General.*

In District Court of Gregg County

[Title omitted.]

*Answer of intervenor, State of Texas, to intervention of R. P. Ash*

Filed January 21, 1938

To the Honorable CLARENCE E. MCGAW, *Judge of Said Court:*

Now comes the State of Texas, intervenor in this proceeding, and in answer to the petition of intervention filed herein by R. P. Ash, intervenor, respectfully pleads and shows to the court:

I

The intervenor, the State of Texas, demurs generally to the petition of intervention of R. P. Ash, intervenor herein, and says that the same fails to state a cause of action and should be dismissed.

II

Now comes the intervenor, the State of Texas, without waiving its demurrer to the plea of intervention of R. P. Ash, but still insisting thereon, and denies all and singular the allegations contained in said plea of intervention and demands strict proof thereof, and of this it puts itself upon the country.

III

For further answer, if such be required, intervenor, State of Texas, hereby adopts all and singular the material
97 allegations contained in paragraph III of the answer filed herein by the United States of America on the — day of January, A. D. 1938, to the petition of intervention of R. P. Ash, and requests that such allegations be incorporated in this answer to all intents and purposes the same as if specifically alleged herein.

Wherefore, intervenor, State of Texas, prays that the intervenor, R. P. Ash take nothing by his suit and that the State of Texas recover its judgment for motor-fuel taxes, penalties, and interest, for foreclosure of its statutory tax lien upon the properties and estate of this receivership or the proceeds therefrom, and that such lien be decreed a paramount preferred lien to any and all liens, claims, or rights asserted herein, all as more specifically prayed in its petition of intervention herein.

WM. MCCRAW,
*Attorney General of the State of Texas.*
PAT M. NEFF, JR.,
*Assistant Attorney General.*

98 In District Court of Gregg County

[Title omitted.]

*Answer of intervenor, State of Texas, to intervention of Howard Dailey*

Filed January 21, 1938

To the Honorable CLARENCE E. MCGAW, *Judge of said Court:*

Now comes the State of Texas, intervenor in this proceeding, and in answer to the petition of intervention filed herein by Howard Dailey, intervenor, respectfully pleads and shows to the Court:

I

The intervenor, the State of Texas, demurs generally to the petition of intervention of Howard Dailey, intervenor herein and says that the same fails to state a cause of action and should be dismissed.

II

Now comes the intervenor, the State of Texas, without waiving its demurrer to the plea of intervention of Howard Dailey, but still

insisting thereon, and denies all and singular the allegations contained in said plea of intervention and demands strict proof thereof, and of this it puts itself upon the country.

Wherefore, intervenor, State of Texas, prays that the
99 intervenor, Howard Dailey, take nothing by his suit and that the State of Texas recover its judgment for motor-fuel taxes, penalties, and interest, for foreclosure of its statutory tax lien upon the properties and estate of receivership or the proceeds therefrom, and that such lien be decreed a paramount preferred lien to any and all liens, claims, or rights asserted herein, all as more specifically prayed in its petition of intervention herein.

WM. MCCRAW,
*Attorney General of the State of Texas.*
PAT M. NEFF, JR.,
*Assistant Attorney General.*

101 In the Special District Court of Gregg County, Texas

No. 2394-B

M. R. INGRAM

*vs.*

W. L. NIX ET AL.

*Judgment*

Filed March 30, 1938

On January 21, 1938, came on to be heard the claims of the various creditors and the question of priorities of such creditors, and the following creditors and their counsel appeared before the Court and presented to the Court their claims and evidence in support thereof: Intervenors: Howard Dailey, the State of Texas, and the United States.

The other parties, claimants and intervenors, made no appearance, and after considering the pleadings of the various parties and hearing the evidence, and the argument of counsel the Court hereby enters the following judgment:

I

The Court overrules all preliminary pleas, demurrers, and exceptions filed in this proceedings, and finds against all the parties who made no appearance for lack of prosecution, and disallows

all claims and interventions filed herein of those claimants who made no appearance.

II

The Court finds that the defendant, W. L. Nix, doing business as the Texas Refinery, on the 19th day of September 1933, for a valuable consideration, and prior to the time that the lien for taxes of either the United States or the State of Texas had attached, executed, and delivered to R. P. Ash his promissory note of that date and thereby promised to pay R. P. Ash the sum of $4,651.86 at 6% interest per annum thereon from said date
102 and 10% attorneys' fees upon the principal and interest if placed in the hands of an attorney for collection; and that on said date the defendant, W. L. Nix, doing business as the Texas Refinery, executed and delivered to the said R. P. Ash his chattel mortgage whereby he granted, sold, and conveyed to R. P. Ash the following-described property to secure the payment of the above-described note:

1 1,500-barrel capacity pipe still, water-cooling tower, laboratory building and equipment, pipe and equipment in water well; 2,000-barrel capacity Bubble Tower, bath house and equipment, office equipment, typewriter and filing cabinets, which said chattel mortgage was duly filed for record in the office of the County Clerk of Gregg County, Texas, the county in which said property was located, September 20, 1933.

That from and after September 19, 1933, R. P. Ash held a valid subsisting mortgage and lien on said property to secure the payment of the said note, which said note, nor any part of it, had been paid, and that on or about the 12th day of July 1937 R. P. Ash, for a valuable consideration, transferred and assigned said note and mortgage and lien on said property to the intervenor, Howard Dailey, and that the intervenor, Howard Dailey, has a valid, prior, and subsisting lien upon the proceeds of said property for the payment of said note. The Court finds that the Receiver appointed in this proceeding sold and disposed of the physical assets of the Texas Refinery, for which he received the sum of $1,618.50, and that the property covered by the said mortgage and lien belonging to Howard Dailey represented 80%
103 of the physical assets, and that Howard Dailey has a valid and subsisting lien upon $1,294.80, representing the proceeds from the property covered by said mortgage from W. L. Nix to R. P. Ash. That the lien of Howard Dailey as to the sum of $1,294.80 is prior and superior to that of the claims and liens of the United States and the State of Texas.

The Court, therefore, orders, decrees, and adjudges that the said intervenor, Howard Dailey, have judgment against W. L. Nix and the Texas Refinery for the sum of $1,294.80, together with interest at the rate of 6% per annum upon said amount from the date of the entry of this judgment until paid, and that said intervenor is entitled to have said amount paid out of the proceeds in the custody of the Court ahead of and prior to the claims of the United States and the State of Texas.

III

The Court finds that J. G. Strong, formerly the Receiver in this proceeding, and while acting as such under appointment in this proceeding, operated the properties of the Texas Refinery, and later under the orders of the Court in this proceeding sold and disposed of all the assets of W. L. Nix and the Texas Refinery, and has paid and discharged all the costs of administration in connection therewith, and has turned into the custody of the Court the sum of $7,516.92. The Court finds, in accordance with agreement with all the parties, that the Receiver is entitled to the sum of $75.00 for payment of services rendered in this proceeding since the final report of the Receiver and the turning into the custody of the Court the said sum of $7,516.92.

104

IV

The Court finds that the Receiver, J. G. Strong, realized all that could have been realized from the assets of W. L. Nix operating as the Texas Refinery, and that such assets are less than the amount of the liabilities of W. L. Nix operating as the Texas Refinery, and that on November 20, 1933, the date of the institution of this proceedings, and since that date up to the date of this judgment that W. L. Nix, operating as the Texas Refinery and this receivership proceedings was and has been at all times insolvent.

V

The Court finds that W. L. Nix, operating as the Texas Refinery, incurred and became and is liable to the United States of America for gasoline taxes and penalty in the total amount of $19,343.91. That said taxes have been assessed by the Commissioner of Internal Revenue and that the United States has a lien upon all the assets of W. L. Nix and the Texas Refinery from the dates that said assessment lists were received by the Collector of Internal Revenue at Dallas, Texas. The Court finds the taxes due the United States and when they became due and the liens therefor are as follows:

| Tax | Period | Amount of tax | Date due | Penalty | Date lien attached |
|---|---|---|---|---|---|
| Gasoline | May 1933 | $480.40 | 6-30-33 | | Jan. 24, 1934 |
| " | June 1933 | 1,036.11 | 7-31-33 | $259.03 | Dec. 20, 1933 |
| " | July 1933 | 949.81 | 8-31-33 | | Dec. 20, 1933 |
| " | Aug. 1933 | 2,488.88 | 9-30-33 | | Dec. 20, 1933 |
| " | Sept. 1933 | 3,014.56 | 10-30-33 | | Jan. 20, 1934 |
| " | Oct. & Nov. 1933 | 11,115.12 | 12-31-33 | | Jan. 20, 1934 |
| | | $19,084.88 | | $259.03 | |

Total tax & penalty $19,343.91.

105 It is further ordered, adjudged, and decreed that the claims of the Collector of Internal Revenue are allowed and that the United States Government have judgment for the full amount of its claim in the total sum of $19,343.91 against the Defendant, W. L. Nix, operating as the Texas Refinery, and that its liens attached to the property in this receivership on the dates aforesaid and that the United States is entitled to interest on said amounts from the dates they became due.

## VI

It is further ordered, adjudged, and decreed that the claim of the State of Texas for Taxes is allowed in full, and that it do have and recover judgment against W. L. Nix Operating as the Texas Refinery, for the full amount of its claims, principals, interest, fines and penalties in the total amount of $42,812.51, which is the total delinquent motor fuel tax sued for with penalties and interest to date of judgment, less a credit of $2,500 by reason of payment to the State of Texas for such sum on January 17, 1938, by Republic Underwriters, Inc., in full discharge and payment of its undertaking as surety on statutory surety bond executed by the defendant distributor.

The court finds that the motor fuel taxes claimed by the State of Texas and the supporting lien therefor under Section 7, Article 7065A, Revised Civil Statutes, accrued and arose on the following dates and in the following amounts, to wit:

| Period | Net delinquent gallons | Net delinquent tax | Penalties | 1938 at 10% | Total | Date lien attached |
|---|---|---|---|---|---|---|
| 1933 | | | | | | |
| October | 410-180 | $16,407.20 | $328.14—2% | $6,977.55 | $23,712.89 | |
| | 1-17-38—Less payment of bond by Republic Underwriters | | | | 2,500.00 | Nov. 20, 1933 |
| 106 November | 318-689 | 12,747.56 | 1,312.58—8% | 540.16 | 1,852.74 | Nov. 20, 1933 |
| | | | 254.95—2% | 5,313.17 | 18,315.68 | Dec. 20, 1933 |
| | | | 1,019.80—8% | 411.40 | 1,431.20 | Dec. 20, 1933 |
| | Allow payment of bond, Cr. | | | $2,500.00 | | |
| | | $29,154.76 | $2,915.47 | $10,742.28 | $42,812.51 | |

VII

As between the State of Texas and the United States Government, the Court finds and holds that the United States is entitled to priority in payment ahead of the State of Texas and that the liens of the United States are first and superior to that of the State of Texas and that the United States is entitled to full payment of its claim before any sum of money is paid to the State of Texas on its claim filed herein.

VIII

It is further ordered, adjudged, and decreed that the claims of the United States shall bear interest at the rate of 6% per annum from the dates that the taxes became due until paid, and the claim of the State of Texas shall bear interest from the date of this judgment at the statutory rate of 10% per annum.

IX

It is further ordered, adjudged, and decreed that except as hereinabove specified, no creditor of the defendant, W. L. Nix, operating as the Texas Refinery, is entitled to judgment against said defendant for any amount and no claimants not specifically named in this judgment are allowed any relief or judgment against the defendant, W. L. Nix, operating as the Texas Refinery.

107

X

It is further ordered, adjudged, and decreed that the money in the custody of the Court shall be disbursed in order of priority as follows:

1. Payment of all court costs incurred in this cause which have not been paid by the Receiver, and payment of additional compensation of $75.00 to J. G. Strong, former Receiver.

2. Payment of the claim of the intervenor, Howard Dailey, in the sum of $1,294.80.

3. Payment of the balance of the amount in the custody of the Court to the United States to be applied upon its judgment in this case, inasmuch as the claim of the United States as allowed is greater than the amount of money in the hands of the Court, and there will be nothing left to be applied on the claim of the State of Texas allowed herein.

XI

To all of which the intervenor, the State of Texas, thereupon in open court objected and excepted, and to all of which judgment

with respect to the claim of Howard Dailey the United States in open Court objected and excepted, and both the State of Texas and the United States in open Court gave notice of appeal to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, Texas.

D. S. MEREDITH, JR., *Judge.*

Approved as to form.

HOWARD DAILEY,
*Intervenor.*
JAMES L. BACKSTROM,
*Special Attorney,*
*Bureau of Internal Revenue.*
PAT M. NEFF, JR.,
*Asst. Atty. General.*

108 In District Court of Gregg County

[Title omitted.]

*Findings of fact and conclusions of law*

Filed May 19, 1938

In response to the request of the United States Government and of the State of Texas, in the above-entitled and numbered cause, I find, make, and file the following as my findings of fact and conclusions of law herein:

*Findings of fact*

1. I find that the Texas Refinery was owned and operated by W. L. Nix in 1933.

2. I find that on September 19, 1933, for a valuable consideration W. L. Nix executed and delivered to R. P. Nash his promissory note of that date in the sum of $4,651.86, bearing interest at the rate of 6% per annum from date, and providing for the usual 10% attorney's fees.

3. I find that W. L. Nix, doing business as Texas Refinery, on September 19, 1933, executed and delivered to R. P. Nash a chattel mortgage to secure the payment of said note, said chattel mortgage covering the following described property: 1—500-barrel-capacity pipe still; Water cooling tower; Laboratory building and equipment; Pipe and Equipment in water well; 2,000-bbl.-capacity Bubble tower; Bath House and equipment; Office Equipment, typewriter and filing cabinets.

109 4. I find that said chattel mortgage was duly filed in the office of the County Clerk of Gregg County on September 20, 1933.

5. I find that on or about July 12, 1937, R. P. Nash, for a valuable consideration, transferred and assigned said note and mortgage lien to Intervenor herein, Howard Dailey.

6. I find that up to the date of this trial nothing has been paid on said note.

7. I find that on November 20, 1933, J. G. Strong was appointed Receiver for Texas Refinery.

8. I find that at the time of such appointment, to wit, November 20, 1933, the Texas Refinery was insolvent.

9. I find that after said appointment said Receiver sold all of the assets of the said Texas Refinery for $1,618.50.

10. I find that of said sum, $1,618.50, eighty percent was covered by the above-mentioned mortgage, and that of the total proceeds derived, to wit, $1,618.50, the sum of $1,294.80 was derived by the Receiver from the sale of the property covered by the mortgage of September 19, 1933.

11. I find that the Receiver, J. G. Strong, realized from the assets of the Texas Refinery all that could be realized therefrom.

12. I find that J. G. Strong, upon his discharge as Receiver, paid into the registry of this Court a total sum of $7,516.92, and that said sum is now in the registry of this Court, save and except $75.00 which has been paid to the said Receiver for services in connection with the receivership.

110 13. I find that the United States Government has a lien for gasoline taxes and penalty in the sum of $19,343.91, which lien attached after September 19, 1933.

14. I find that the State of Texas has a lien for delinquent motor-fuel taxes, interest, fines, and penalties in the total sum of $42,812.51, less $2,500.00 paid by the Republic Underwriters, Inc., as surety for the Texas Refinery.

15. I find that the lien of the State of Texas, set out above, for the months of October and November 1933, attached after September 19th, 1933.

*Conclusions of law*

1. The lien now held by Howard Dailey is prior and superior to the liens of the United States and of the State of Texas, and that Howard Dailey should have judgment against W. L. Nix and Texas Refining Company in the sum of $1,294.80, which is eighty percent of the sum of $1,680.50, the price for which the assets of Texas Refinery were sold, together with interest at the rate of 6% per annum upon said amount from March 20, 1938, and that said sum shall be paid out of the proceeds now in the custody of this Court, ahead of and prior to the claim of the United States and the State of Texas.

2. That the United States Government should have judgment for the full amount of its claim, in the sum of $19,343.91, against W. L. Nix, operating as Texas Refinery, and that such lien attached to the property in this receivership, and that such lien should bear interest at the rate of 6% per annum from March 30, 1938, said lien in favor of the United States Government being inferior and subsequent to the lien heretofore decreed to Intervenor, Howard Dailey.

111 3. That the State of Texas should have and recover judgment against W. L. Nix, operating as Texas Refinery, in the sum of $40,312.51, together with interest thereon from March 30, 1938, and that such lien of the State of Texas is inferior and subsequent to the lien of Intervenor, Howard Dailey, and the United States Government.

4. That after the payment of Howard Dailey of the lien herein decreed to him, in the sum of $1,294.80, with interest, that the remainder of the funds now in custody of this Court should be paid to the United States Government.

D. S. MEREDITH, JR.,
*Judge.*

113 [Clerk's certificate to foregoing transcript omitted in printing.]

272 [File endorsement omitted.]

In Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth

No. 13899

THE STATE OF TEXAS, ET AL., APPELLANTS

*vs.*

W. L. NIX, ET AL., APPELLEES

From the District Court of Gregg County

*Certified questions*

Filed April 21, 1939

*To the Honorable Supreme Court of Texas:*

The appeal pending before this court in the above styled cause grows out of a judgment rendered by the District Court of Gregg County, in favor of Howard Dailey, as intervening plaintiff, against W. L. Nix, in which Dailey was awarded a recovery for a portion of the amount sued for, the establishment of the validity

and priority of his chattel mortgage lien on certain personal property, and the right to have his judgment paid out of certain funds held in the registry of the court. The funds from which payment was ordered were placed in the registry of the court by a previously appointed receiver of the property of the defendant, Nix.

W. L. Nix was, for a time, engaged in the refinery
273 business, under the trade name of Texas Refinery. He manufactured and distributed motor fuel and thereby became liable for the payment of certain taxes thereon to the United States and to the State of Texas. He failed to pay certain of those taxes, and when suit was instituted against him by the original owner of certain notes owing and to foreclose certain chattel mortgage liens previously executed by him to secure their payment, a receiver was appointed, who, under orders of the court, leased the refinery plant for a time and later sold its physical assets. The proceeds coming into the receiver's hands were deposited in the registry of the court.

We believe that the following statement from the entire record will suffice to place before the Court the points involved:

M. R. Ingram sued W. L. Nix, doing business in the trade name of Texas Refinery, and Heartfield Refinery Company, Inc., in a district court of Gregg County, Texas, for recovery on a note in the principal sum of $1,163.49, with interest at 8% per annum from its date along with the usual and customary ten per cent attorney fees, seeking a foreclosure of a chattel mortgage lien on six 250-barrel run down tanks, and one 1,000-barrel storage tank, alleged to be a part of the equipment used in connection with a refinery. The note and mortgage were alleged to have been executed by Heartfield Refining Company, Inc., to plaintiff, on May 11th, 1933, and that the chattel mortgage lien was forthwith filed for record.

274 Further allegations are to the effect that subsequent to the execution and delivery of the note and mortgage, Heartfield Refinery Company, Inc., for a valuable consideration, sold and delivered to defendant, W. L. Nix, the mortgaged property, and that Nix assumed to pay plaintiff said indebtedness evidenced by the note.

Plaintiff's pleadings further show that the indebtedness is past due and unpaid, that demand has been made therefor and that Nix is insolvent. Other allegations state facts which, if true, would authorize the appointment of a receiver for the business operated by Nix.

Prayer was for the debt and foreclosure of the chattel mortgage lien and for a receiver; that a sale of the property by the receiver be ordered and that the proceeds of such sale be applied to the liquidation of plaintiff's debt and for general relief.

After notice, the court heard the application and entered an order appointing a receiver of the business operated by W. L. Nix, in which order, among other things, it is recited: * * * And the plaintiff appearing by counsel and the defendant having appeared, and plaintiff having announced ready on his application, the court having read the verified oath of complaint and hearing the statement and admissions in open court, is of the opinion and finds that the same presents the proper case authorizing the appointment of a receiver, ex parte, and for granting the relief shown in this order." J. G. Strong was appointed receiver, his bond set and his duties defined.

275 The Federal Government, the State of Texas, and R. P. Ash intervened as creditors of W. L. Nix. Ash's claims consisted of two notes secured by chattel mortgages. The first note was for $1,750.00, dated April 27th, 1933, with 8% interest per annum from date and ten percent attorney fees, secured by a chattel mortgage on what was known as the Heartfield Refining Company plant (excepting the part previously mortgaged to plaintiff). Ash's second note was in the sum of $4,651.86, dated September 19th, 1933, with 8% interest per annum from date and attorney fees, secured by a chattel mortgage on one 1,500-barrel capacity Pipe and Still, Water Cooling Tower, Laboratory Building and Equipment, Pipe and Equipment in Water Well, 2,000-barrel capacity bubble tower, Bath house and equipment, Office furniture, typewriter, and filing cabinets. It was alleged these notes were both due and unpaid. Prayer in that intervention was for debt and foreclosure of the lien on the property described.

The State of Texas intervened under its claim for $28,870.16, then due the State by W. L. Nix for taxes, penalty, and interest, on motor fuel manufactured and distributed, upon which the tax had not been paid under Article 7065a, Vernon's Civil Statutes, et seq., and for a foreclosure of its alleged first and preferred lien on all the property of W. L. Nix, including that described in plaintiff's and Ash's alleged chattel mortgages.

The United States, acting by and through W. A. Thomas, Collector of Internal Revenue for the Second District of Texas,
276 intervened, made proof of, and asked for judgment for its debt of $20,907.61, for taxes and penalties due on motor fuels manufactured and sold by Nix, for which no payment had been made. This intervener claimed and asked for a foreclosure of its first and preferred lien on all property of Nix, under and by virtue of Section 3466 of Revised Statutes of the United States, Section 191, Title 31, U. S. C. A.

Thereafter, on January 21st, 1938, Howard Dailey was permitted by the court to intervene, as the sole plaintiff, under allegations that he had acquired all the rights in the subject matter

theretofore held by the original plaintiff, M. R. Ingram, and intervener R. P. Ash. An amended petition was at that time filed by intervener Dailey, alleging the indebtedness and liens acquired by him, largely in the same language previously set out by Ingram and Ash. Further allegations were made that the receiver, theretofore appointed by the court, had, under orders of the court, sold the assets of W. L. Nix, doing business in the name of Texas Refinery, and had turned into the registry of the court, (less costs and expenses incurred) the total sum of $7,466.92.

Prayer was for allowance of his indebtedness, that he be given judgment for the amount, and that his claim and liens be decreed as prior and superior to all others of the parties, whether plaintiff, defendants, or interveners, and that an order be entered directing payment from the funds in the registry of the court, for costs and general relief.

Interveners, United States and the State of Texas, renewed their pleas of intervention in much the same way as in their
277 original pleadings, and further answered and denied that the substituted plaintiff, Dailey, was entitled to the relief sought. Each intervener insisted upon its respective rights and priorities theretofore pleaded.

Upon trial to the court, evidence was heard, about which there is little or no controversy under the issues involved here. Judgment was entered favorable to the intervening plaintiff, Dailey, as well also more favorable to the intervener, United States, than to the State of Texas.

The court found in his judgment that Dailey was the owner of the Ingram note originally sued on and of the two notes owned by Ash at the time of his intervention; that these debts were secured by liens on those parts of the assets of Nix, described in the respective mortgages; that said liens were first and superior as against those asserted by interveners, United States and the State of Texas. There was a further finding that the asserted lien of the United States was prior and superior to that of the State of Texas.

The court further found that the property upon which Dailey held his first and superior lien constituted eighty per cent of all the assets of Nix coming into the hands of the receiver and sold by him; that out of the sum of $7,466.92 then in the registry of the court, so deposited by the receiver, certain parts thereof were the proceeds of operation and leasing of the refinery plant, and that $1,618.50 thereof represented the total sum for which the receiver sold said physical assets, and that said sale was the best that could be obtained by the receiver and had been approved by the court. That by reason of the fact that Daily had a

278 first and superior lien against eighty per cent of said assets, he was entitled to receive from the proceeds of said sale $1,294.80 therefrom, and that the United States having a second lien on said property, it should receive the remainder of said total fund; that said remainder being insufficient to satisfy the United States tax and lien, there was nothing left with which to pay the tax debt and lien of the State. There was a further finding that by agreement of all parties the receiver was entitled to be paid from said fund $75.00 for services rendered, before either plaintiff, Dailey, or the United States should be paid any sum. The decree ordered paid from the fund in the registry of the court, (1) all costs incurred in the suit not previously paid by the receiver, including $75.00 to the receiver; (2) the claim of intervener, Dailey, in the sum of $1,294.80; and (3) the balance to the United States to be applied upon its judgment and claim for taxes. The decree further recites, "Inasmuch as the claim of the United States as allowed, is greater than the amount of money in the hands of the court, there will be nothing left to be applied on the claim of the State of Texas allowed herein."

The intervener, State of Texas, excepted to the rulings of the court. The United States excepted to that part of the judgment giving intervener, Dailey, a preference lien to that of the Federal Government, and both the United States and the State of Texas gave notice of appeal to the Texarkana Court of Civil Appeals. The State of Texas alone perfected the appeal.

279 Both the United States and the State of Texas made proof of their respective claims against Nix for taxes, interest, and penalties due and unpaid. Those of the United States, accruing during the months of May, June, July, August, September, October, and November 1933, aggregated $19,914.81. The States of Texas made proof of taxes, interest, and penalties, to date of trial, due for the months of October and November 1933, in the aggregate sum of $30,797.69.

In entering the judgment, the trial court considered the chattel mortgage liens held by intervening plaintiff, Dailey, to be first and prior to those asserted by each the United States and the State of Texas, and that the lien of United States was first and superior to the rights of the State of Texas.

The United States claimed a first preferred and superior lien under and by virtue of the U. S. Rev. St. Section 3466, Sect. 191, Title 31, U. S. C. A., which reads:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States

shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

In support of its contention that its claim matured into a first and superior lien under the Federal Statute above referred
280 to, the United States relies upon the following authorities: Price vs. U. S., 269 U. S. 492; Hatch vs. Morosco Holding Co., Inc., 61 Fed. (2) 944; Gerson, Beesley & Hampton, Inc. vs. Shubert Theater Corp., 7 Fed. Supp. 399; People of the State of N. Y. vs. Maclay et al., 288 U. S. 290; State of Texas vs. Wynne, 113 S. W. (2d) 325, Churchill vs. Straus Investing Corp., 27 F. S. 316.

The State of Texas claims a first, prior and preferred lien on all the property of the distributor, under Article 7065a, Sect. 7, Vernon's Texas Civil Statutes. The portion of Section 7 relied upon reads, in part, as follows: "All taxes, fines, penalties, and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the time such liens originated, upon all the property of the distributor, devoted to or used in his business as a distributor * * *."

The State of Texas further relies upon the holdings of our courts, in support of its contention that it has a first, prior and preferred lien, in numerous cases cited, among which it especially emphasizes: State vs. Bank of Mineral Wells (Tex. Civ. App.) 251 S. W. 1107; Preston vs. Anderson Co. Imp. Dist., 261 S. W. 1077 (writ refused); Kirk vs. City of Gorman (Tex. Civ. App.) 283 S. W. 188; Wood vs. Scott, 48 S. W. (2d) 1024 (writ refused); Childress County vs. State (Sup.) 92 S. W. (2d) 1011.

It is contended by the intervening plaintiff below, appellee here, that Article 7065a, Sect. 7, Vernon's Texas Civ. St., relied upon by the State, insofar as it attempts to confer a first,
281 prior and preferred lien on all personal property of the distributor used in connection with his business, to previously created contract liens, such as held by him, is void as being in violation of the provisions of our State Constitution, Article I, Section 16, and of the United States Constitution, Article I, section 10. Each of which prohibits the passage of ex post facto laws or those which impair the obligation of contracts.

We had before us recently the case of the State of Texas vs. Wynne, reported in 113 S. W. (2d) 325, which involved, among

other things, the questions arising in this appeal. A writ of error was granted by that Honorable Court in that case, and has not yet been reached for consideration.

We have expressed our views in this case, as shown by the accompanying tentative opinion, but in view of the status of the Wynne case, supra, we deem it advisable to certify the issues involved here to that Honorable Court. The questions involved and which we desire to have answered are:

1. Do the provisions of Section 7 of Article 7065a, V. T. C. S., which give to the State of Texas "a preferred lien, first and prior to any and all other existing liens" upon all the property of the distributor, devoted to or used in connection with the business as a distributor, to secure the payment to the State, for all taxes, penalties and interest due the State, under the Motor Fuel Act, violate the provisions of Article I, Section 16, of the State Constitution and Article I, Section 10, of the U. S. Constitution?

282 2. Under the conditions and facts shown in this case, did the trial court commit an error in holding that the claim of the United States for taxes, penalties and interest should be paid out of the funds in the registry of the court before the similar claims of the State of Texas were paid?

IRBY DUNKLIN,
*Chief Justice, Court of Civil Appeals*
*for the Second Supreme Judicial District of Texas.*

APRIL 21, 1939.

283 [File endorsement omitted.]

In Court of Civil Appeals for the Second Supreme Judicial District of Texas

[Title omitted.]

*Tentative opinion*

Filed April 21, 1939

M. R. Ingram sued W. L. Nix, doing business in the trade name of Texas Refinery, and Heartfield Refinery Company, Inc., in a district court of Gregg County, Texas, for recovery on a note in the principal sum of $1,103.49, with interest at 8% per annum from its date, along with the usual and customary ten-percent attorneys' fees, seeking a foreclosure of a chattel-mortgage lien on six 250-barrel run-down tanks and one 1,000-barrel storage tank, alleged to be a part of the equipment used in connection with

a refinery. The note and mortgage were alleged to have been executed by Heartfield Refinery Co., Inc., to plaintiff on May 11, 1933, and that the chattel-mortgage lien was forthwith filed for record.

Further allegations are to the effect that subsequent to the execution and delivery of the note and mortgage, Heart-
284 field Refinery Co., Inc., for a valuable consideration, sold and delivered to defendant, W. L. Nix, the mortgaged property, and that Nix assumed to pay plaintiff said indebtedness evidenced by the note.

Plaintiff's pleadings further show that the indebtedness is past due and unpaid, that demand has been made therefor, and that Nix is insolvent. Other allegations state facts, which, if true, would authorize the appointment of a receiver for the business operated by Nix.

Prayer was for the debt and foreclosure of the chattel-mortgage li and for a receiver, that a sale of the property by the receiver be ordered, and that the proceeds of such sale be applied to the liquidation of plaintiff's debt and for general relief.

After notice, the court heard the application and entered an order appointing a receiver of the business operated by W. L. Nix, in which order, among other things, it is recited: "* * * And the plaintiff appearing by counsel and the defendant having appeared, and plaintiff having announced ready on his application, the court having read the verified oath of complaint and hearing the statement and admissions in open court, is of the opinion and finds that the same presents the proper case authorizing the appointment of a receiver, ex parte, and for granting the relief shown in this order." J. G. Strong was appointed receiver, his bond set, and his duties defined.

The Federal Government, the State of Texas, and R. P. Ash intervened as creditors of W. L. Nix. Ash's claims
285 consisted of two notes secured by chattel mortgages. The first note was for $1,750, dated April 27, 1933, with 8% interest per annum from date and ten-percent attorneys' fees, secured by a chattel-mortgage lien on what was known as the Heartfield Refining Company plant (excepting the part previously mortgaged to plaintiff). Ash's second note was in the sum of $4,651.86, dated September 19, 1933, with 8% interest per annum from date and attorneys' fees, secured by a chattel mortgage on one 1,500-barrel capacity Pipe and Still, Water Cooling Tower, Laboratory Building and Equipment, Pipe and Equipment in Water Well, 2,000-barrel capacity bubble tower, Bath house and equipment, Office furniture, typewriter and filing cabinets. It was alleged these notes were both due and unpaid.

Prayer in that intervention was for debt and foreclosure of the lien on the property prescribed.

The State of Texas intervened under its claim for $28,870.16 due the State by W. L. Nix for taxes on motor fuel manufactured and sold, upon which the tax had not been paid under Article 7065a Vernon's Civil Statutes, et seq., and for a foreclosure of its alleged first and preferred lien on all the property of W. L. Nix, including that described in plaintiff's and Ash's alleged chattel mortgages.

The United States, acting by and through W. A. Thomas, Collector of Internal Revenue for the Second District of Texas, intervened, made proof of, and asked for judgment for its debt of $20,907.61 for taxes and penalties due on motor fuels manufactured and sold by Nix, for which no payment had been made.

This intervener claimed and asked for a foreclosure of its
286 first and preferred lien on all property of Nix, under and by virtue of Section 3466 of Revised Statutes of the United States, Section 191, Title 31, U. S. C. A.

Thereafter, on January 21, 1938, Howard Dailey was permitted by the court to intervene, as the sole plaintiff, under allegations that he had acquired all the rights in the subject matter theretofore held by the original plaintiff, M. R. Ingram, and intervener R. P. Ash. An amended petition was at that time filed by intervener Dailey alleging the indebtedness and liens acquired by him, largely in the same language previously set out by Ingram and Ash. Further allegations were made that the receiver, theretofore appointed by the court, had, under orders of the court, sold the assets of W. L. Nix, doing business in the name of Texas Refinery, and had turned into the registry of the court (less costs and expenses incurred) the total sum of $7,466.92.

Prayer was for allowance of his indebtedness, that he be given judgment for the amount and that his claim and liens be decreed as prior and superior to all others of the parties, whether plaintiff, defendants, or interveners, and that an order be entered directing payment from the funds in the registry of the court, for costs and general relief.

Interveners United States and the State of Texas renewed their pleas of intervention in much the same way as in their original pleadings, and further answered and denied that the substituted plaintiff Dailey was entitled to the relief sought. Each intervener insisting upon its respective rights and priorities theretofore pleaded.

287 Upon trial to the court, evidence was heard, about which there is little or no controversy under the issues involved here. Judgment was entered favorable to the intervening plaintiff

Dailey as well also more favorable to the intervener United States, than to the State of Texas.

The court found in his judgment that Dailey was the owner of the Ingram note originally sued on and of the two notes owned by Ash at the time of his intervention; that these debts were secured by liens on those parts of the assets of Nix, described in the respective mortgages; that said liens were first and superior as against those asserted by interveners, United States and the State of Texas. There was a further finding that the asserted lien of the United States was prior and superior to that of the State of Texas.

The court further found that the property upon which Dailey held his first and superior lien constituted eighty percent of all the assets of Nix coming into the hands of the receiver and sold by him; that out of the sum of $7,466.92 then in the registry of the court so deposited by the receiver, certain parts thereof were the proceeds of operation and leasing of the refinery plant, and that $1,618.50 thereof represented the total sum for which the receiver sold said physical assets, and that said sale was the best that could be obtained by the receiver and had been approved by the court. That by reason of the fact that Dailey had a first and superior lien against eighty percent of said assets, he was entitled to receive from the proceeds of said sale $1,294.80 therefrom, and that the United States having a second lien on said property, it
288 should receive the remainder of said total fund; that said remainder being insufficient to satisfy the United States tax and lien there was nothing left with which to pay the tax debt and lien of the State. There was a further finding that by agreement of all parties the receiver was entitled to be paid from said fund $75.00 for services rendered, before either plaintiff, Dailey, or the United States should be paid any sum. The decree ordered paid from the fund in the registry of the court, (1) All costs incurred in the suit not previously paid by the receiver, including $75.00 to the receiver. (2) The claim of intervener Dailey in the sum of $1,294.80. And (3) The balance to the United States to be applied upon its judgment and claim for taxes. The decree further recites "Inasmuch as the claim of the United States as allowed, is greater than the amount of money in the hands of the Court, there will be nothing left to be applied on the claim of the State of Texas allowed herein."

The intervener State of Texas excepted to the rulings of the court. The United States excepted to that part of the judgment giving intervener Dailey a preference lien to that of the Federal Government, and both the United States and the State of Texas gave notice of appeal to the Texarkana Court of Civil Appeals.

The State of Texas alone perfected the appeal, and by an equalizing order by our Supreme Court the case is before us for review.

Appellant (State of Texas) presents this appeal upon what we deem two propositions, although subdivided several times. They are (1) The trial court erred in holding that intervener
289 Dailey's claim and lien were superior to that held by the State; and (2) The Court erred in holding that the lien of Intervener United States was superior to that of the State.

In appellant's brief it is said: "Consequently, the sole question for determination is whether or not the evident purpose embodied in Section 7, Article 7065 (a) R. C. S. is to be stricken down as violative of Article 1, Section 16, Constitution of Texas, and Article 1, Section 10, Constitution of the United States."

It is not claimed in this case that the taxes sued for by the State are ad valorem, but are occupation or excise taxes. If they were ad valorem taxes, then another question would arise, not now before us. Article 8, Sect. 15, State Constitution, provides that the annual assessment made upon landed property shall be a special lien thereon; and that all property both real and personal, belonging to a delinquent taxpayer shall be liable to seizure and sale for payment of taxes due.

There is nothing in the record before us in this case, which indicates that any part of the property upon which the tax lien is claimed by the State, was real estate; it is described as personalty. The constitutional provision mentioned does not provide for a lien thereon to secure the payment of delinquent taxes, but only that such property shall be subject to levy and sale therefor. The prior and preference lien asserted here by the State must depend upon the authority of the Legislature to make it such. This was attempted by the Act relied upon here.

290 The Act is contained in Art. 7065a, and at Section 7, among other things, provides: "All taxes, fines, penalties, and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the time such liens originated, upon all the property of such distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, etc. * * *."

In support of the State's contention that it has a preferred and prior lien on the personal property of Nix operating as the Texas Refinery, for the occupation or excise tax levied and then due, we are cited to the Act (Article 7065a). State vs. Bank of Mineral Wells (Tex. Civ. App.) 251 S. W. 1107; Preston vs. Anderson

County Levee Improvement Dist., 261 S. W. 1077, writ refused; Kirk vs. City of Gorman (Tex. Civ. App.) 283 S. W. 188; Wood vs. Scott, 48 S. W. (2d) 1024, writ refused; Childress County vs. State (Sup.) 92 S. W. (2d) 1011. In each of those cases except Kirk vs. City of Gorman, the tax for which the lien was claimed to secure, was ad valorem against real estate, and we entertain no doubt as to the correctness of the principle announced in each case, that the State had a preferred and prior lien on the landed property to secure the payment of taxes. And it is likewise well settled that the same rule applies to special taxes on such property when included in Special Districts provided for by the Constitution and laws of the state. The exception among the
291 cases cited above involved an asserted preferens lien on personal property levied upon by the City of Gorman for payment of delinquent taxes. Kirk and Brewer, two of the defendants, claimed a chattel mortgage lien on the personalty, executed prior to the accrual of the taxes and the levy. The debt and lien securing it were barred by the statute of limitations, and it was held the City could interpose that defense as against its tax lien. The court specifically declined to pass upon the question of whether or not the City of Gorman could legally declare by charter, that such a tax lien would be superior to those created by contract before the levy and attempt to collect the tax.

It is earnestly argued by the State that such taxes, as those levied ad valorem, and as occupation or excise, are of equal dignity, since they each go to support and maintain the State in all its sovereign functions. It reasons, that surely the framers of our Constitution did not intend that the Legislature could authorize the levy of a tax, such as the one under consideration, and then leave the State helpless as to a means of enforcing collection; that is, leave it optional with the taxpayer whether or not he would pay, or even permit another with whom he has previously contracted, to prevent the collection of such a tax. It is contended that in view of the vast amount of taxes accruing to the State under the Motor Fuel Act, to strike down the prior and preferred lien clause under Section 7 thereof, would materially affect the taxing powers and revenues of the State derived therefrom.

We do not agree with these contentions. We think the Act a good and wholesome one, essential to the welfare of the
292 State and not unfair to those who desire to bring themselves under it. We also think its provisions, aside from and independent of Section 7, are abundantly sufficient to give each, the State and the operator, every protection needed.

In this connection, a résumé of the provisions of the Act is pertinent. As the law now stands, Article 7065a, Vernon's Tex.

Civ. Statutes, and the several sections thereof, provide in effect: Section 2 imposes an occupation or excise tax of four cents on each gallon of motor fuel manufactured and sold. Section 3. All manufacturers and distributors of motor fuel, desiring to engage in such business, after the law becomes effective, shall make application to the State Comptroller for a permit for that purpose. Section 4. Upon receipt of a proper application and the bond provided for in the Act, the Comptroller will issue the permit. Section 5. Upon violation of any of the provisions of the Act, the Comptroller may forfeit the permit of such distributor. Section 6. Before any permit may issue to a distributor, he must first file the application above mentioned, accompanied by a bond in a sum not less than $1,000 and not to exceed $25,000, conditioned that he will keep and perform all the conditions and requirements of the Act; such bond to be executed by him and one or more good and sufficient Surety Companies authorized by law to do business in this state. Section 7 provides for the first and preferred lien on all property of the distributor, referred to in a previous part of this opinion, and is the part of the Act here in controversy.

Other portions of the Bill provide additional safeguards
293 for the State and distributor relating to the business and need not be enumerated here.

The tax due to the State is collectible on the 20th of each month, and a failure to so pay is a violation of the Act for which various penalties are provided; among which, the permit may be cancelled by the Comptroller, or if the bond previously executed by the distributor is deemed insufficient a new one for an additional amount may be required. For these and other reasons apparent, we do not think the life and effectiveness of the Act is dependent upon a sustaining of the validity of Section 7 which, as stated, provides for the prior and preferred lien on all property of the distributor to secure the payment of the tax. In addition even to the provisions pointed out, a very broad discretion is conferred by the Legislative Act upon the Comptroller to promulgate and enforce rules and regulations in connection with the stated provisions of the law not inconsistent therewith, for its enforcement. It is further declared by the Legislature in passing the bill, that if any section thereof should be held to be in conflict with the Constitution of this State, it shall in no wise affect other parts thereof. We think Section 7 of the Act, applied to the facts in this case, insofar as it attempts to give a prior and preferred lien on all property, including personalty of the distributor, to secure the payment of the tax, is in violation of our State Constitution, Article I, Section 16, which reads:

"No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."

294 To the same effect are the provisions of Article I, Section 10, of the Constitution of the United States. Insofar as applicable here it reads: "No State shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, * * *."

The wisdom of such provisions as those quoted, has never been, and we think, will never be successfully attacked. Since the establishment of our government, there has never been a time when individuals were not encouraged to deal with other persons in business in such a way as would emphasize the benefits of business and social relations. These matters have been doubly emphasized in recent years, including the time of the passage of the Motor Fuel Act by our Legislature, when men with idle money have been encouraged to lend it, upon ample security, to business and industry, resulting in the employment of labor. All these noble purposes would be thwarted if, when a lender and borrower, in good faith attempt to enter into such a contract mutually beneficial to accomplish this purpose, our State should thereafter be permitted to pass laws which would impair that contract, with such a disastrous result, as in this case, to confiscate the security taken by the one and given by the other to effectuate the enhancement of industry and society. It cannot be countenanced solely because of a public necessity, for indeed this does not exist, since as we have seen, the State may be amply protected in its taxing rights by an enforcement of the provisions of the law, as written. We do not believe it is incumbent upon the lender, the appellee in this case, to see that the

295 Comptroller enforce the provisions of the Act, to protect the security taken for the loan. This duty rests with the officials whose duty it is to enforce the provisions of the law.

The second complaint made by assignment of error by the State is that the trial court erred in holding that the lien of the United States was prior to that of the State of Texas. If we are correct in our conclusions hereinabove expressed that the State had no prior and preferred lien on the property of the distributor, then what we have said disposes of the second contention made.

The record before us discloses that at the time of the institution of this suit it was alleged, substantially, that W. L. Nix was insolvent and for grounds shown a receiver was asked. Nix appeared at the hearing and made certain "statements and admissions," the nature of which is not disclosed, upon all of which the receiver was appointed. Upon its face this is equivalent to

an act of bankruptcy. In these circumstances it has often been held that the taxes due the Federal Government have a preference over those due a state. Section 3466 U. S. Rev. St., Section 191, 31 U. S. C. A.; Bramwell vs. U. S. Fidelity & Guaranty Co., 269 U. S. 483, 70 L. Ed. 368; United States vs. Butterworth-Judson Corp., 269 U. S. 504, 70 L. Ed. 380; People etc. vs. Maclay, 288 U. S. 290, 77 L. Ed. 754, and many other cases to the same effect.

We had the case of State vs. Wynne (Tex. Civ. App.), 113 S. W. (2d) 325, before us recently and considered there, along with others, the points involved here, and upon the same issues
296 we expressed ourselves as we have in this case. The Supreme Court granted a writ of error and will review that decision. Believing that we correctly decided that case, we see no reason at this time to reach a different conclusion.

Many authorities are cited in the Wynne, supra, case, not specifically pointed out here. We have briefly summarized our views in this tentative opinion.

We believe the trial court correctly decided the case and that its judgment therefore should be affirmed.

JOHN SPEER, *Associate Justice.*

297 In Court of Civil Appeals for the Second Supreme Judicial District of Texas

[Title omitted.]

*Order certifying questions*

April 21, 1939

It is ordered that the questions shown in certificate this day filed be, and they are hereby, certified to the Supreme Court for decision, accompanied by the tentative opinion of this court this day filed.

298 [File endorsement omitted.]

In Court of Civil Appeals for the Second Supreme Judicial District of Texas

[Title omitted.]

*Motion of intervener, the United States of America*

Filed May 15, 1939

Comes now the United States of America, an Intervener herein, by and through Steve M. King, United States District Attorney; J. L. Backstrom and B. W. Berg, Special Attorneys for the Bu-

reau of Internal Revenue, and moves this Honorable Court to amend or supplement its abstract incorporated with questions certified in the above-styled action to the Supreme Court of Texas on April 21, 1939, to specifically include therein the finding of the Trial Court that the assets of W. L. Nix, operating as the Texas Refinery, were less than the amount of liabilities of said debtor; that from November 20, 1933, the date this proceeding was instituted, to January 21, 1938, the entry of the judgment by the Trial Court that the said W. L. Nix, operating as the Texas Refinery in this receivership proceeding, was and has been at all times insolvent, and for reasons thereof state:

299 That the amount of claims involved are not in dispute; the sole issue is priority in payment from the funds in the registry of the Court. The Government relies upon Section 3466 of the Revised Statutes, Section 191, Title 31, U. S. C. A., which, among other things, declares priority in payment in the event the debtor is insolvent. That whenever the provisions of this Act are invoked and the question of insolvency arises, that fact may be determinative of the issue involved. The Government definitely re[illegible]s upon the finding of insolvency by the Trial Court on January 21, 1938, which has not been modified or reversed, the same being as follows:

"The Court finds that the Receiver, J. G. Strong, realized all that could have been realized from the assets of W. L. Nix, operating as the Texas Refinery, and that such assets are less than the amount of the liabilities of W. L. Nix, operating as the Texas Refinery, and that on November 20, 1933, the date of the institution of this proceedings, and since that date up to the date of this judgment, that W. L. Nix, operating as the Texas Refinery, and this receivership proceedings was and has been at all times insolvent."

In view of the importance of the priority issue here and in similar cases now pending and undecided in the Courts of Texas, and the effect the decision in this case will have as a precedent and guide in future litigation, it is important that the record should be definite and contain a complete analysis of fact

300 and law for the guidance of the Court in definitely determining the issue involved.

That this Intervener respectfully suggests the importance of this finding of the Trial Court for the purpose of allaying any possible misunderstanding on the question of insolvency from the institution of this proceeding in so far as it may enter and control the issue here involved.

That on May 3, 1939, this case was submitted to the Supreme Court of Texas, along with the case of The State of Texas vs.

B. J. Wynne et al., on appeal from the decision of this Court dated January 14, 1938, and the United States of America, as an intervener, was granted fifteen days thereafter in which to seek from this Court an amended or supplemental certificate incorporating the finding of insolvency.

Wherefore, it is respectfully prayed that this motion be granted and that this Honorable Court submit to the Supreme Court of Texas an additional finding as above set forth.

STEVE M. KING,
*United States District Attorney,*
*Beaumont, Texas.*
J. L. BACKSTROM,
B. W. BERG,
*Special Attorneys for the Bureau of*
*Internal Revenue, Dallas, Texas.*

301 In Court of Civil Appeals for the Second Supreme Judicial District of Texas

[Title omitted.]

*Order amending certified questions*

May 16, 1939

This day came on to be heard the motion by Intervener, United States of America, to amend the certificate to the Supreme Court, heretofore filed in this cause, and the said motion having been duly considered by the court is hereby granted, per supplemental certificate this day filed, and the Clerk of this court will forward said supplemental certificate forthwith to the Supreme Court.

302 [File endorsement omitted.]

IN COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

[Title omitted.]

*Supplement to certificate*

Filed May 16, 1939

*To the Honorable Supreme Court of Texas:*

In the above styled cause, we submitted to Your Honors certain questions, deemed by us necessary for a determination of the issues involved. One of which questions and its answer will be

affected by whether or not W. L. Nix, doing business as Texas Refinery, was insolvent at the time of the institution of the suit. Our attention has been called to the fact that our certificate is silent on this point. We therefore deem it proper to supplement said certificate in this respect. Immediately preceding the last paragraph on page six, we desire to add:

There is evidence in the record to support the following finding in the judgment rendered by the trial court:

363 "The court finds that the Receiver, J. G. Strong, realized all that could have been realized from the assets of W. L. Nix operating as the Texas Refinery, and that such assets are less than the amount of the liabilities of W. L. Nix operating as the Texas Refinery, and that on November 20, 1933, the date of the institution of this proceedings, and since that date up to the date of this judgment that W. L. Nix, operating as the Texas Refinery and this receivership proceedings was and has been at all times insolvent."

IRBY DUNKLIN,
*Chief Justice Court of Civil Appeals,*
*Second Supreme Judicial District of Texas.*

364 [File endorsement omitted.]

In Supreme Court of Texas

[Title omitted.]

*Opinion on certified questions*

Filed in C. C. A. March 8, 1940

This case is before us on certified questions from the Court of Civil Appeals for the Second District. The statement and certified questions read as follows:

"The appeal pending before this court in the above styled cause grows out of a judgment rendered by the District Court of Gregg County, in favor of Howard Dailey, as intervening plaintiff, against W. L. Nix, in which Dailey was awarded a recovery for a portion of the amount sued for, the establishment of the validity and priority of his chattel mortgage lien on certain personal property, and the right to have his judgment paid out of certain funds held in the registry of the court. The funds from which payment was ordered were placed in the registry of the court by a previously appointed receiver of the property of the defendant, Nix.

"W. L. Nix was, for a time, engaged in the refinery busi-
305 ness, under a trade name of Texas Refinery. He manufactured and distributed motor fuel and thereby became liable for the payment of certain taxes thereon to the United States and to the State of Texas. He failed to pay certain of those taxes, and when suit was instituted against him by the original owner of certain notes owing and to foreclose certain chattel mortgage liens previously executed by him to secure their payment, a receiver was appointed, who, under orders of the court, leased the refinery plant for a time and later sold its physical assets. The proceeds coming into the receiver's hands were deposited in the registry of the court.

"We believe that the following statement from the entire record will suffice to place before the Court the points involved:

"M. R. Ingram sued W. L. Nix, doing business in the trade name of Texas Refinery, and Heartfield Refinery Company, Inc., in a district court of Gregg County, Texas, for recovery on a note in the principal sum of $1,103.49, with interest at 8% per annum from its date along with the usual and customary ten per cent attorney fees, seeking a foreclosure of a chattel mortgage lien on six 250-barrel run down tanks, and one 1,000-barrel storage tank, alleged to be a part of the equipment used in connection with a refinery. The note and mortgage were alleged to have been executed by Heartfield Refining Company, Inc., to plaintiff, on May 11th, 1933, and that the chattel mortgage lien was forthwith filed for record.

306 "Further allegations are to the effect that subsequent to the execution and delivery of the note and and mortgage, Heartfield Refinery Company, Inc., for a valuable consideration, sold and delivered to defendant, W. L. Nix, the mortgaged property, and that Nix assumed to pay plaintiff said indebtedness evidenced by the note.

"Plaintiff's pleadings further show that the indebtedness is past due and unpaid, that demand has been made therefor, and that Nix is insolvent. Other allegations state facts which, if true, would authorize the appointment of a receiver for the business operated by Nix.

"Prayer was for the debt and foreclosure of the chattel mortgage lien and for a receiver; that a sale of the property by the receiver be ordered, and that the proceeds of such sale be applied to the liquidation of plaintiff's debt and for general relief.

"After notice, the court heard the application and entered an order appointing a receiver of the business operated by W. L. Nix, in which order, among other things, it is recited: '* * * And

the plaintiff appearing by counsel and the defendant having appeared, and plaintiff having announced ready on his application, the court having read the verified oath of complaint and hearing the statement and admissions in open court, is of the opinion and finds that the same presents the proper case authorizing the appointment of a receiver, ex parte, and for granting the relief shown in this order.' J. G. Strong was appointed receiver, his bond set, and his duties defined.

307 "The Federal Government, the State of Texas, and R. P. Ash intervened as creditors of W. L. Nix. Ash's claims consisted of two notes secured by chattel mortgages. The first note was for $1,750.00, dated April 27th, 1933, with 8% interest per annum from date and ten per cent attorney fees, secured by a chattel mortgage lien on what was known as the Heartfield Refining Company plant (excepting the part previously mortgaged to plaintiff). Ash's second note was in the sum of $4,651.86, dated September 19th, 1933, with 8% interest per annum from date and attorney fees, secured by a chattel mortgage on one 1,500-barrel capacity Pipe and Still, Water Cooling Tower, Laboratory Building and Equipment, Pipe and Equipment in Water Well, 2,000-barrel capacity bubble tower, Bath house and equipment, Office furniture, typewriter, and filing cabinets. It was alleged these notes were both due and unpaid. Prayer in that intervention was for debt and foreclosure of the lien on the property described.

"The State of Texas intervened under its claim for $28,870.16, then due the State by W. L. Nix for taxes, penalty and interest, on motor fuel manufactured and distributed, upon which the tax had not been paid under Article 7065a, Vernon's Civil Statutes, et seq., and for a foreclosure of its alleged first and preferred lien on all the property of W. L. Nix, including that described in plaintiff's and Ash's alleged chattel mortgage.

"The United States, acting by and through W. A. Thomas, Collector of Internal Revenue for the Second District of Texas,

308 intervened, made proof of and asked for judgment for its debt of $20,907.61, for taxes and penalties due on motor fuels manufactured and sold by Nix, for which no payment had been made. This intervener claimed and asked for a foreclosure of its first and preferred lien on all property of Nix, under and by virtue of Section 3466 of Revised Statutes of the United States, Section 191, Title 31, U. S. C. A.

"Thereafter, on January 21st, 1938, Howard Dailey was permitted by the court to intervene, as the sole plaintiff, under allegations that he had acquired all the rights in the subject matter theretofore held by the original plaintiff, M. R. Ingram, and intervener R. P. Ash. An amended petition was at that time filed by inter-

vener Dailey, alleging the indebtedness and liens acquired by him, largely in the same language previously set out by Ingram and Ash. Further allegations were made that the receiver, theretofore appointed by the court, had, under orders of the court, sold the assets of W. L. Nix, doing business in the name of Texas Refinery, and had turned into the registry of the court (less costs and expenses incurred) the total sum of $7,466.92.

"Prayer was for allowance of his indebtedness, that he be given judgment for the amount and that his claim and liens be decreed as prior and superior to all others of the parties, whether plaintiff, defendants, or interveners, and that an order be entered directing payment from the funds in the registry of the court, for costs and general relief.

"Interveners, United States and the State of Texas, renewed their pleas of intervention in much the same way as in their original pleadings, and further answered and denied that the substi-
309 tuted plaintiff, Dailey, was entitled to the relief sought. Each intervener insisted upon its respective rights and priorities theretofore pleaded.

"Upon trial to the court, evidence was heard about which there is little or no controversy under the issues involved here. Judgment was entered favorable to the intervening plaintiff, Dailey, as well also more favorable to the intervener, United States, than to the State of Texas.

"The court found in his judgment that Dailey was the owner of the Ingram note originally sued on and of the two notes owned by Ash at the time of his intervention; that these debts were secured by liens on those parts of the assets of Nix, described in the respective mortgages; that said liens were first and superior as against those asserted by interveners, United States and the State of Texas. There was a further finding that the asserted lien of the United States was prior and superior to that of the State of Texas.

"The court further found that the property upon which Dailey held his first and superior lien constituted eighty percent of all the assets of Nix coming into the hands of the receiver and sold by him; that out of the sum of $7,466.92 then in the registry of the court, so deposited by the receiver, certain parts thereof were the proceeds of operation and leasing of the refinery plant, and that $1,618.50 thereof represented the total sum for which the receiver sold said physical assets, and that said sale was the best that could be obtained by the receiver and had been approved by the court That by reason of the fact that Daily had a first and superior lien against eighty percent of said assets, he was entitled
310 to receive from the proceeds of said sale $1,294.80 therefrom,

and that the United States having a second lien on said property, it should receive the remainder of said total fund; that said remainder being insufficient to satisfy the United States tax and lien, there was nothing left with which to pay the tax debt and lien of the State. There was a further finding that by agreement of all parties the receiver was entitled to be paid from said fund $75.00 for services rendered, before either plaintiff, Dailey, or the United States should be paid any sum. The decree ordered paid from the fund in the registry of the court, (1) all costs incurred in the suit not previously paid by the receiver, including $75.00 to the receiver; (2) the claim of intervener, Dailey, in the sum of $1,294.80; and (3) the balance to the United States to be applied upon its judgment and claim for taxes. The decree further recites, 'Inasmuch as the claim of the United States as allowed, is greater than the amount of money in the hands of the court, there will be nothing left to be applied on the claim of the State of Texas allowed herein.'"

In a supplement to the certificate, the Court of Civil Appeals added the following statement:

"There is evidence in the record to support the following finding in the judgment rendered by the trial court:

"'The court finds that the Receiver, J. G. Strong, realized all that could have been realized from the assets of W. L. Nix operating as the Texas Refinery, and that such assets are less than the amount of the liabilities of W. L. Nix operating as the Texas Refinery, and that on November 20, 1933, the date of the institution of this
311 proceedings, and since that date up to the date of this judgment that W. L. Nix, operating as the Texas Refinery and this receivership proceedings was and has been at all times insolvent.'"

Continuing with the original statement:

"The intervener, State of Texas, excepted to the rulings of the court. The United States excepted to that part of the judgment giving intervener, Dailey, a preference lien to that of the Federal Government, and both the United States and the State of Texas gave notice of appeal to the Texarkana Court of Civil Appeals. The State of Texas alone perfected the appeal.

"Both the United States and the State of Texas made proof of their respective claims against Nix for taxes, interest and penalties due and unpaid. Those of the United States, accruing during the months of May, June, July, August, September, October and November 1933, aggregated $19,914.81. The State of Texas made proof of taxes, interest and penalties to date of trial, due for the months of October and November 1933, in the aggregate sum of $30,797.69.

"In entering the judgment, the trial court considered the chattel mortgage liens held by intervening plaintiff, Dailey, to be first and prior to those asserted by each the United States and the State of Texas, and that the lien of United States was first and superior to the rights of the State of Texas.

"The United States claimed a first preferred and superior lien under and by virtue of the U. S. Rev. St. Section 3466, Sect. 191, Title 31, U. S. C. A., which reads:

312 "'Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.'

"In support of its contention that its claim matured into a first and superior lien under the Federal Statute above referred to, the United States relies upon the following authorities: Price vs. U. S., 269 U. S. 492; Hatch vs. Morosco Holding Co., Inc., 61 Fed. (2) 944; Gerson, Beesley & Hampton, Inc., vs. Shubert Theater Corp., 7 Fed. Supp. 399; People of the State of N. Y. v. Maclay et al., 288 U. S. 290; State of Texas vs. Wynne, 113 S. W. (2d) 325; Churchill vs. Straus Investing Corp., 27 F. S. 316.

"The State of Texas claims a first, prior and preferred lien on all the property of the distributor, under Article 7065a, Sect. 7, Vernon's Texas Civil Statutes. The portion of Section 7 relied upon reads, in part, as follows: 'All taxes, fines, penalties, and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the
313 time such liens originated, upon all the property of the distributor, devoted to or used in his *business* as a distributor * * *.'

"The State of Texas further relies upon the holdings of our courts, in support of its contention that it has a first, prior and preferred lien, in numerous cases cited, among which it especially emphasizes: State vs. Bank of Mineral Wells (Tex. Civ. App.) 251 S. W. 1107; Preston vs. Anderson Co. Imp. Dist., 261 S. W. 1077 (writ refused); Kirk vs. City of Gorman (Tex. Civ. App.) 283 S. W. 188; Wood vs. Scott, 48 S. W. (2d) 1024 (writ refused); Childress County vs. State (Sup.) 92 S. W. (2d) 1011.

"It is contended by the intervening plaintiff below, appellee here, that Article 7065a, Sect. 7, Vernon's Texas Civ. St., relied upon by the State, in so far as it attempts to confer a first, prior and preferred lien on all personal property of the distributor used in connection with his business, to previously created contract liens, such as held by him, is void as being in violation of the provisions of our State Constitution, Article I, Section 16, and of the United States Constitution, Article I, Section 10. Each of which prohibits the passage of ex post facto laws or those which impair the obligation of contracts.

"We had before us recently the case of the State of Texas vs. Wynne, reported in 113 S. W. (2d) 325, which involved, among other things, the questions arising in this appeal. A writ of error was granted by that Honorable Court in that case, and has not yet been reached for consideration.

314 "We have expressed our views in this case, as shown by the accompanying tentative opinion, but in view of the status of the Wynne Case, supra, we deem it advisable to certify the issues involved here to that Honorable Court. The questions involved and which we desire to have answered are:

"1. Do the provisions of Section 7 of Article 7065a, V. T. C. S., which give to the State of Texas 'a preferred lien, first and prior to any and all other existing liens' upon all the property of the distributor, devoted to or used in connection with the business as a distributor, to secure the payment to the State, for all taxes, penalties and interest due the State, under the Motor Fuel Act, violate the provisions of Article I, Section 16, of the State Constitution and Article I, Section 10, of the U. S. Constitution?

"2. Under the conditions and facts shown in this case, did the trial court commit an error in holding that the claim of the United States for taxes, penalties and interest should be paid out of the funds in the registry of the court before the similar claims of the State of Texas were paid?"

For the reasons given in an opinion handed down by this Court on this date in the case of State of Texas vs. B. J. Wynne et al., — S. W. (2d) —, we answer Question No. 1 "No." and Question No. 2 "Yes."

JOHN H. SHARP,
*Associate Justice.*

Opinions Delivered December 6, 1939.

315 [Clerk's certificate to foregoing paper omitted in printing.]

In Supreme Court of Texas

No. 7574

THE STATE OF TEXAS, ET AL.

*vs.*

W. L. NIX, ET AL.

Certified Question from Gregg County, 2nd Dist.

*Judgment*

December 6, 1939

It is ordered by the Court that the opinion herein delivered, answering the Certified Questions, be certified to the Court of Civil Appeals for the Second Supreme Judicial District, and that said cause be therein proceeded with in accordance with said opinion.

[Clerk's certificate to foregoing paper omitted in printing.]

317 In Court of Civil Appeals for the
Second Supreme Judicial District of Texas

13899

THE STATE OF TEXAS ET AL.

*vs.*

W. L. NIX ET. AL.

From the District Court of Gregg County

*Judgment*

March 15, 1940

This cause came on to be heard on the transcript of the record, and the same being inspected, it is the opinion of the court that there was error in the judgment. It is therefore, ordered, adjudged, and decreed that the judgment of the trial court be and it is hereby reversed and judgment here rendered, as should have been rendered by the trial court, as follows, in accordance with the answers of the Supreme Court to certified questions:

First, that the plaintiff (intervener) Howard Dailey, take nothing, by reason of this suit, and that the funds in the registry of the trial court be applied first to the payment of all costs not previously paid by the receiver, including the costs incurred in this

court and in the Supreme Court on certified questions, and $75.00 stipulated to be due said receiver, J. G. Strong, for additional services rendered by him;

Second, judgment is here rendered for the appellant, The State of Texas, against all parties, to the extent of the amount remaining in the registry of said trial court, after payment of the costs as above ordered, to be applied to the payment of the tax shown to be due said State of Texas.

It is further ordered that this decision be certified below for observance.

(Recorded Vol. 15, Page 365, Minutes of Court of Civil Appeals Second Supreme Judicial District of Texas.)

318 [File endorsement omitted.]

In Court of Civil Appeals for the Second Supreme Judicial District of Texas

No. 13899

THE STATE OF TEXAS, ET AL., APPELLANTS

*vs.*

W. L. NIX, ET AL., APPELLEES

From the District Court of Gregg County

*Opinion*

Filed March 15, 1940

M. R. Ingram sued W. L. Nix, doing business in the trade name of Texas Refinery, and Heartfield Refinery Company, Inc., in a district court of Gregg County, Texas, for recovery on a note in the principal sum of $1,103.49, with interest at eight per cent per annum from its date, along with the usual and customary ten per cent attorney's fees, seeking a foreclosure of a chattel mortgage lien on six 250-barrel run down tanks, and one 1,000-barrel storage tank, alleged to be a part of the equipment used in connection with a refinery. The note and mortgage were alleged to have been executed by Heartfield Refining Com-
319 pany, Inc., to plaintiff on May 11th, 1933, and that the chattel mortgage lien was forthwith filed for record.

Further allegations are to the effect that subsequent to the execution and delivery of the note and mortgage, Heartfield Refinery Company, Inc., for a valuable consideration, sold and

delivered to defendant, W. L. Nix, the mortgaged property, and that Nix assumed to pay plaintiff said indebtedness evidenced by the note.

Plaintiff's pleadings further show that the indebtedness is past due and unpaid, that demand has been made therefor and that Nix is insolvent. Other allegations state facts which, if true, would authorize the appointment of a receiver for the business operated by Nix.

Prayer was for the debt and foreclosure of the chattel mortgage lien and for a receiver; that a sale of the property by the receiver be ordered and that the proceeds of such sale be applied to the liquidation of plaintiff's debt and for general relief.

After notice, the court heard the application and entered an order appointing a receiver of the business operated by W. L. Nix, in which order, among other things, it is recited: "* * * And the plaintiff appearing by counsel and the defendant having appeared, and plaintiff having announced ready on his application; the court having read the verified oath of complaint and hearing the statement and admissions in open court, is of the opinion and finds that the same presents the proper case authorizing the appointment of a receiver, ex parte, and for granting the relief shown in this order." J. G. Strong was appointed receiver,
320 his bond set and his duties defined.

The federal government, the State of Texas, and R. P. Ash intervened as creditors of W. L. Nix. Ash's claims consisted of two notes secured by chattel mortgages. The first note was for $1,750, dated April 27th, 1933, with eight per cent interest per annum from date, and ten per cent attorney's fees, secured by a chattel mortgage lien on what was known as the Heartfield Refining Company plant (excepting the part previously mortgaged to plaintiff). Ash's second note was in the sum of $4,651.86, dated September 19th, 1933, with eight per cent interest per annum from date and attorney's fees, secured by a chattel mortgage on one 1,500-barrel capacity Pipe and Still, Water Cooling Tower, Laboratory Building and Equipment, Pipe and Equipment in Water Well, 2,000-barrel capacity bubble tower, Bath house and equipment, Office furniture, typewriter and filing cabinets. It was alleged these notes were both due and unpaid. Prayer in that intervention was for debt and foreclosure of the lien on the property described.

The State of Texas intervened under its claim for $28,870.16, due the State by W. L. Nix for taxes on motor fuel manufactured and sold, upon which the tax had not been paid under Article 7065a Vernon's Civil Statutes, et seq., and for a foreclosure of its alleged first and preferred lien on all the property of W. L. Nix,

including that described in plaintiff's and Ash's alleged chattel mortgages.

The United States, acting by and through W. A. Thomas,
321 Collector of Internal Revenue for the Second District of Texas, intervened, made proof of and asked for judgment for its debt of $20,907.61 for taxes and penalties due on motor fuels manufactured and sold by Nix, for which no payment had been made. This intervener claimed and asked for a foreclosure of its first and preferred lien on all property of Nix, under and by virtue of Section 3466 of Revised Statutes of the United States, Section 191, Title 31, U. S. C. A.

Thereafter, on January 21st, 1938, Howard Dailey was permitted by the court to intervene, as the sole plaintiff, under allegations that he had acquired all the rights in the subject matter theretofore held by the original plaintiff, M. R. Ingram, and intervener, R. P. Ash. An amended petition was at that time filed by intervener Dailey, alleging the indebtednesses and liens acquired by him, largely in the same language previously set out by Ingram and Ash. Further allegations were made that the receiver, theretofore appointed by the court, had, under orders of the court, sold the assets of W. L. Nix, doing business in the name of Texas Refinery, and had turned into the registry of the court (less costs and expenses incurred) the total sum of $7,466.92.

Prayer was for allowance of his indebtedness, that he be given judgment for the amount and that his claim and liens be decreed as prior and superior to all others of the parties, whether plaintiff, defendants or interveners, and that an order be entered directing payment from the funds in the registry of the court, for costs and general relief.

322 Interveners, United States and the State of Texas, renewed their pleas of intervention in much the same way as in their original pleadings, and further answered and denied that the substituted plaintiff, Dailey, was entitled to the relief sought. Each intervener insisting upon its respective rights and priorities theretofore pleaded.

Upon trial to the court, evidence was heard, about which there is little or no controversy under the issues involved here. Judgment was entered favorable to the intervening plaintiff, Dailey, as well also more favorable to the intervener, United States, than to the State of Texas.

The court found in his judgment that Dailey was the owner of the Ingram note originally sued on and of the two notes owned by Ash at the time of his intervention; that these debts were secured by liens on those parts of the assets of Nix, described

in the respective mortgages; that said liens were first and superior as against those asserted by interveners, United States and the State of Texas. There was a further finding that the asserted lien of the United States was prior and superior to that of the State of Texas.

The court further found that the property upon which Dailey held his first and superior lien constituted eighty per cent of all the assets of Nix coming into the hands of the receiver and sold by him; that out of the sum of $7,466.92 then in the registry of the court, so deposited by the receiver, certain parts thereof were the proceeds of operation and leasing of the refinery plant, and that $1,618.50 thereof represented the total sum for which
323 the receiver sold said physical assets, and that said sale was the best that could be obtained by the receiver and had been approved by the court. That by reason of the fact that Dailey had a first and superior lien against eighty per cent of said assets, he was entitled to receive from the proceeds of said sale $1,294.80 therefrom, and that the United States having a second lien on said property, it should receive the remainder of said total fund; that said remainder being insufficient to satisfy the United States tax and lien, there was nothing left with which to pay the tax debt and lien of the State. There was a further finding that by agreement of all parties the receiver was entitled to be paid from said fund $75.00 for services rendered, before either plaintiff, Dailey, or the United States should be paid any sum. The decree ordered paid from the fund in the registry of the court, (1) all costs incurred in the suit not previously paid by the receiver, including $75.00 to the receiver; (2) the claim of intervener Dailey in the sum of $1,294.80; and (3) the balance to the United States to be applied upon its judgment and claim for taxes. The decree further recites: "Inasmuch as the claim of the United States as allowed, is greater than the amount of money in the hands of the court, there will be nothing left to be applied on the claim of the State of Texas allowed herein."

The intervener, State of Texas, excepted to the rulings of the court. The United States excepted to that part of the judgment giving intervener Dailey a preference lien to that of the federal government, and both the United States and the State of
324 Texas gave notice of appeal to the Texarkana Court of Civil Appeals. The State of Texas alone perfected the appeal, and by an equalizing order by our Supreme Court, the case is before us for review.

Appellant (State of Texas) presents this appeal, upon what we deem two propositions, although subdivided several times. They are (1) the trial court erred in holding that intervener Dailey's claim and lien were superior to that held by the State; and (2) the court erred in holding that the lien of intervener, United States, was superior to that of the State.

In appellant's brief it is said: "Consequently, the sole question for determination is whether or not the evident purpose embodied in Section 7, Article 7065 (a) R. C. S. is to be stricken down as violative of Article 1, Section 16, Constitution of Texas, and Article 1, Section 10, Constitution of the United States."

It is not claimed in this case that the taxes sued for by the State are ad valorem, but are occupation or excise taxes. If they were ad valorem taxes, then another question would arise, not now before us. Article 8, Section 15, State Constitution, provides that the annual assessment made upon landed property shall be a special lien thereon; and that all property, both real and personal, belonging to a delinquent taxpayer, shall be liable to seizure and sale for payment of taxes due.

There is nothing in the record before us in this case which indicates that any part of the property upon which the tax lien is claimed by the State was real estate; it is described
325 as personalty. The constitutional provisions mentioned does not provide for a lien thereon to secure the payment of delinquent taxes, but only, that such property shall be subject to levy and sale therefor. The prior and preference lien asserted here by the State must depend upon the authority of the Legislature to make it such. This was attempted by the Act relied upon here.

The Act is contained in Art. 7065a, and at Section 7, among other things, provides: "All taxes, fines, penalties, and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the time such liens originated, upon all the property of such distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, etc. * * *."

It is earnestly argued by the State that such taxes, as those levied ad valorem, and as occupation or excise, are of equal dignity, since they each go to support and maintain the State in all its sovereign functions. It reasons, that surely the framers of our Constitution did not intend that the Legislature could authorize the levy of a tax, such as the one under consideration, and then

leave the State helpless as to a means of enforcing collection: that is, leave it optional with the taxpayer whether or not he would pay, or even permit another with whom he has previously contracted, to prevent the collection of such a tax. It is contended that in view of the vast amount of taxes accruing to the State under the Motor Fuel Act, to strike down the prior and preferred lien clause under
326 Section 7 thereof would materially affect the taxing powers and revenues of the State derived therefrom.

In view of the contentions made by the State, we certified to the Supreme Court the two points involved. In response to our certificate, that Court answered our questions, in effect, as follows: 1. That the provisions of Section 7, Article 7065a, V. T. C. S. giving to the State a preferred lien, first and prior to all other existing liens upon all the property of the distributor, used in the business, to secure the payment to the State for the tax, did not violate the provisions of Article 1, Section 16, of our State Constitution. 2. That the trial court erred in holding that the claim of the United States for taxes, penalties and interest should be paid out of the funds in the registry of the court, before the similar claims of the State of Texas were paid. See opinion by Supreme Court, State, et al. vs. Nix, et al., 133 S. W. (2d) 963.

The record discloses that all facts necessary to a determination of the rights of the several parties were thoroughly developed at the trial, and no necessity exists for further findings. Upon authority of the expressions found in the last above cited case and that of State vs. Wynne, et al., 133 S. W. (2d) 951, referred to by the Supreme Court in the Nix case, supra, the judgment of the trial court is reversed and here rendered that plaintiff take nothing and that the funds in the registry of the court be applied first to the payment of all costs not previously paid by the receiver and $75.00 stipulated to be due him for additional services rendered; and second, that the State of Texas have judgment
327 against all parties to the extent of the remaining amount in the court's hands, to be applied to the payment of the tax shown to be due it. Obviously there will be nothing left in the fund for payment to any other party. But under the holding in the Wynne case, supra, the classification of the respective claims would be that of the State of Texas, first, that of valid lien holders, second, and the claim of the United States, third. Judgment of the trial court is therefore reversed and here rendered, as above indicated.

JOHN SPEER,
*Associate Justice.*

328 In Court of Civil Appeals for the Second Supreme Judicial District of Texas

[Title omitted.]

*Motion for rehearing*

Filed March 27, 1940

*To the Honorable Justices of the Court of Civil Appeals for the Second Supreme Judicial District of Texas:*

Comes now the United States of America, one of the intervenors in the above entitled and numbered cause, and moves this Honorable Court to set aside the judgment and decision entered herein on March 15, 1940, and to grant this intervenor a rehearing herein, and in support thereof says as follows:

1. This Honorable Court erred in rendering judgment in favor of the State of Texas against the United States of America, to the extent of the remaining amount of money in the
329 Court's hands, after the payment of all unpaid costs.

2. This Honorable Court erred in holding that the claim of the State of Texas is entitled to payment prior to the claim of the United States of America.

3. This Honorable Court erred in not classifying the claim of the United States of America herein as being entitled to priority over the claim of the State of Texas herein.

Wherefore, the United States of America prays that this Honorable Court grant it a rehearing herein, that its opinion and judgment entered on March 15, 1940, be set aside, and that the United States of America be granted a rehearing herein, and render judgment to the effect that the claim of the United States of America should be paid out of the funds in the Registry of the Court before the similar claim of the State of Texas is paid.

STEVE M. KING,
*United States Attorney.*
JOHN D. RIENSTRA,
*Assistant U. S. Attorney.*

330 In Court of Civil Appeals for the Second Supreme Judicial District of Texas

[Title omitted.]

*Order overruling motion for rehearing*

April 12, 1940

This day came on to be heard the motion in behalf of the United States of America for a rehearing in this cause, and the same having been duly considered by the court is hereby overruled.

335 [File endorsement omitted.]

338 In Supreme Court of Texas at Austin

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

*vs.*

THE STATE OF TEXAS ET AL., DEFENDANTS IN ERROR

*Application for writ of error on behalf of the United States of America, in cause No. 13899, in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, wherein the State of Texas and valid lien holders are the adverse parties*

Filed May 14, 1940

*To the Supreme Court of Texas:*

Your Petitioner, United States of America, respectively represents that in the above styled cause, on the 15th day of March 1940, the Court of Civil Appeals for the Second Supreme Judicial District of Texas, rendered its opinion, holding that the classification of the respective claims herein would be that of the State of Texas first, that of the valid lien holders second, and the claim of the United States third, and reversing the judgment of the trial Court and rendering judgment as above indicated. Thereafter, in due time your Petitioner filed its motion for rehearing in said Court of Civil Appeals, praying that the judgment of said Court of March 15, 1940, be vacated and set aside, and that judgment be rendered to the effect that the claim of the United States of America should be paid out of the funds in the Registry of the trial Court before the payment of the similar claim of the State of Texas. Said motion for rehearing was thereafter, on the 12th day of April 1940, overruled and denied, and said judgment of the Court of Civil Appeals of March 15, 1940, thereupon became final.

339 PRELIMINARY STATEMENT

This suit originated in the District Court of Gregg County, Texas, being an action by M. R. Ingram against W. L. Nix for recovery on a note in the principal sum of $1,103.49, together with interest and attorneys' fees, and the foreclosure of a chattel mortgage lien on certain described refinery equipment. Prayer was for the debt and foreclosure of the chattel mortgage lien, and for the appointment of a receiver, for the sale of the property by the receiver, and that the proceeds be applied to the liquidation of Ingram's debt. A receiver was appointed, and thereafter your Petitioner, the United States of America, the State of Texas, and

other creditors intervened, claiming liens upon the refinery equipment and other assets belonging to W. L. Nix.

The State of Texas intervened under its claim for $28,870.16, due it by Nix for taxes on motor fuel manufactured and sold, upon which the tax had not been paid under Article 7065a, Vernon's Civil Statutes et seq., and for a foreclosure of its alleged first and preferred lien on all the property of W. L. Nix, including that described in Plaintiff's chattel mortgage.

The United States of America intervened, and made proof of and asked for judgment for its debt of $20,907.61, for taxes and penalties due on motor fuels manufactured and sold by Nix, for which no payment had been made. The United States of America claimed and asked for a foreclosure of its first and preferred lien on all property of Nix, under and by virtue of Section 3466 of Revised Statutes of the United States, Title 31, Section 191, U. S. C. A. The United States of America claimed that the provisions of said Section 3466 were applicable and entitle it to priority over all claims because of the fact, which was later established, that W. L. Nix was insolvent.

Thereafter, on January 21, 1938, Howard Dailey was permitted to intervene, as the sole Plaintiff, under allegations that he had acquired all of the rights and interests of the original Plaintiff, Ingram, and the
340 intervener R. P. Ash. Interveners, United States of America and the State of Texas, renewed their pleas of intervention, and further answered and denied that the substituted Plaintiff, Dailey, was entitled to the relief sought.

Upon a trial to the Court, said Court entered judgment that the liens of Dailey were first and superior as against those asserted by the United States of America and the State of Texas, and that the asserted lien of the United States was prior and superior to that of the State of Texas. Judgment was accordingly entered that out of the sum of $7,466.92, then in the Registry of the Court, (1) $75.00 was to be paid to the receiver for his services; (2) all costs incurred in the suit not previously paid were to be paid; (3) the claim of Dailey, in the sum of $1,294.80, was next to be paid; (4) the balance of said sum was to be paid to the United States of America, to be applied upon its judgment and claim for taxes. The judgment further recited that "inasmuch as the claim of the United States, as allowed, is greater than the amount of money in the hands of the Court, there will be nothing left to be applied on the claim of the State of Texas allowed herein."

The State of Texas excepted to the ruling of the Court and perfected its appeal to the Texarkana Court of Civil Appeals, and by an equalizing order by the Supreme Court, the case was trans-

ferred to the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Thereafter, the Court of Civil Appeals for the Second Supreme Judicial District of Texas certified to the Supreme Court of Texas two questions, accompanied by a statement of the nature of the litigation, which is substantially as stated above. The questions so certified were:

"1. Do the provisions of Section 7 of Article 7065a, V. T. C. S., which give to the State of Texas 'a preferred lien, first and prior to any and all other existing liens' upon all the property of the distributor, devoted to or used in connection with the business as a distributor, to secure the payment to the State, for all
341 taxes, penalties, and interest due the State, under the Motor Fuel Act, violate the provisions of Article I, Section 16, of the State constitution and Article I, Section 10, of the U. S. Constitution?

"2. Under the conditions and facts shown in this case, did the trial court commit an error in holding that the claim of the United States for taxes, penalties and interest should be paid out of the funds in the registry of the court before the similar claims of the State of Texas were paid?"

Thereafter, on December 6, 1939, the Supreme Court of Texas delivered its opinion upon said certified questions, wherein it is stated by the Supreme Court of Texas that "for the reasons given in an opinion handed down by this Court on this date in the case of State of Texas vs. B. J. Wynne, et al. — S. W. (2d) —, we answer question Number One 'no' and question Number Two 'yes.'" Thereafter, in due time, your Petitioner, the United States of America, filed its motion for rehearing before the Honorable Supreme Court of Texas, which motion for rehearing was, on March 6, 1940, overruled. In due time, the answers of the Supreme Court of Texas to such certified questions were certified to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and, as heretofore stated, on March 15, 1940, the said Court of Civil Appeals handed down its decision classifying the respective claims in the following order:

(1) That of the State of Texas.
(2) That of the valid lien holders.
(3) That of the United States of America.

Thereafter, in due time, your Petitioner, United States of America, filed its motion for rehearing with the Court of Civil Appeals, and on April 12, 1940, said motion for rehearing on behalf of the United States was overruled.

342 The claim of priority asserted by the United States of America is based upon the provisions of Section 3466 of

the Revised Statutes of the United States, Title 31, Section 191, U. S. C. A., which reads as follows:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

There was an expressed finding by the trial Court, and by the Court of Civil Appeals, that W. L. Nix, on and subsequent to November 20, 1933, was and had been at all times insolvent.

The foregoing statement is undisputed, as shown by the certificate of the Court of Civil Appeals to the Supreme Court of Texas, and as shown by the opinion of said Court of Civil Appeals rendered on March 15, 1940. It is the contention of the United States of America, Petitioner herein, that its claim for taxes due by W. L. Nix is, under the provisions of the above quoted Section 3466, Revised Statutes of the United States, entitled to priority over the claim of the State of Texas. It was so held by the trial Court, but as heretofore stated, the Court of Civil Appeals, in its opinion herein rendered on March 15, 1940, held that the claim of the State of Texas was entitled to priority over the claim of the United States of America. The question at issue was, therefore, first decided against the United States of
343 America in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the error of said Court of Civil Appeals in so holding was assigned and presented to said Court of Civil Appeals in your Petitioner's motion for rehearing, which was duly and timely filed.

344 STATEMENT OF GROUNDS OF JURISDICTION AND QUESTIONS DECIDED

## I

Generally.—The Court of Civil Appeals in reversing the judgment of the trial court and rendering judgment as above indicated held that the United States of America was not entitled to prior payment of its claim before the payment of the claim of the State of Texas. This case is one in which the jurisdiction of the Court of Civil Appeals is not final. The matter within

the jurisdiction of this Court is presented under Subdivision 6, Article 1728, Revised Civil Statutes of Texas, as amended.

## II

The ruling of the Court of Civil Appeals is prejudicial to the right of your Petitioner in that an error of substantive law was committed by said court which was material to the decision in this case and substantially affected the judgment rendered by the Court of Civil Appeals herein.

As pointed out in the preliminary statement, the decision of the Court of Civil Appeals rendered on March 15, 1940, and of which complaint is here made, was predicated upon the answers of this Honorable Court to certified questions submitted in this case. This Honorable Court, for the reasons stated in an opinion handed down on the same date in the case of State of Texas vs. B. J. Wynne, et al., bearing Docket No. 7464 in this Honorable Court, held that the trial court in the instant case committed error in adjudging the claim of the United States of America to be superior to the claim of the State of Texas. Therefore, the Court of Civil Appeals in the instant case, relying upon State of Texas vs. Wynne, et al., 133 S. W. (2d) 951, and the answers to the certified questions, rendered its decision herein on March 15, 1940, of which complaint is made.

As we understand the opinion of this Honorable Court in the Wynne case, this court held that the claim of the United States would have to be ranked inferior to the claim of the State of Texas, since it was unquestioned that the claim of the State of Texas was superior to the lien claims, and it was likewise
345 unquestioned that the valid lien claims were superior to the claim of the United States. This appears from the following language used by this court in the Wynne case:

"Under the decisions of the Federal courts, bona fide transfers of property and valid liens held by mortgagees, in existence at the time the tax is due the United States, shall be superior to the claim of the United States; and such liens take precedence over the claim of the United States under the Federal statutes just cited. Counsel for the United States concede this. The State has declared that its claim is prior to all other claims. The United States recognizes certain rights as being prior to its claim. At most, the claim of the United States is second. But it is contended that the claim of the United States should be ranked prior to the claim of the State. Such reasoning would make the claim of the state third in rank and would place the claims of

the United States and the lienholders prior to the claim of the State. In order to give the United States precedence over the State in this case, this Court would be compelled to hold, in construing Section 7 of Article 7065a, that the claims held by the State thereunder should be inferior to those of lienholders and the claim of the United States. Such a holding would absolutely nullify that Section and destroy the clear intention of the Legislature expressed therein."

It is the Petitioner's contention that the ultimate holding of this Honorable Court does not follow from the situation described by this Court in the above extract from its opinion. This Court's attention is directed to the case of Spokane County vs. United States, 279 U. S. 80; in that case Chief Justice Taft thoroughly reviewed the various decisions of the United States Supreme Court and held that the United States was entitled to have its claim for taxes paid before a similar claim for taxes on behalf of the County of Spokane, Washington, was paid. In that case the County of Spokane made the identical contention which this Honorable Court follows in the above quoted excerpt from the opinion. In said case of Spokane County vs. United States at Page 91 of 279 U. S. the following language is used by Chief Justice Taft:

"Petitioners rely on Ferris v. Chic-Mint Gum Co., 14 Del. Ch. 232, where there were several claimants—a mortgagee, the State, and the United States. Under R. S. 3186, the mortgagee was given priority over the United States. By state law, the State was preferred to the mortgagee. The Chancellor allowed the claims in the order of the State, the mortgagee, and the United States, holding that "when the Government agreed by Section 3186 to take rank after the mortgagee, it must necessarily follow that it is subordinate in rank to those who are superior to its immediate senior." The Chancellor observed that his conclusion arose out of the peculiar facts of the case, and that it was unnecessary for him to venture into the broad field of constitutional law. Without concurring in the conclusion of the Chancellor, it is enough to say that, as there is no such third creditor here, the case is not in point. Moreover, it is contended by the Government that the relative priorities could have been maintained in that case by setting apart sufficient funds to pay the mort-
346 gage before paying the federal taxes and then providing for payment of the state tax out of the sum so set apart."

It will be noted that the Chief Justice states that no third creditor was involved in that case. But without question the Chief Justice recognizes the validity of the contention made by the Government

that the priorities could be maintained by setting apart sufficient funds to pay the mortgage before paying the Federal taxes and then providing for the payment of the State tax out of the sum set apart to pay the mortgage. Applying said language to the instant case, the Court could set aside the sum of $1,294.80 for the benefit of the valid lien holders whose liens were superior to the claim of the United States, then pay the balance of the fund on deposit to the United States of America, and then provide for the payment of the State of Texas out of the sum set aside to the valid lien holders. This procedure would maintain the priority of the United States over the State of Texas, it would maintain the priority of the State of Texas over the lien holders, and it would maintain the priority of the lien holders over the claim of the State of Texas. It, therefore, appears that the decision reached by this Honorable Court in the Wynne case does not necessarily follow from the situation described by this Court wherein it states that the lien of the State of Texas is superior to the chattel mortgage liens and that said chattel mortgage liens are superior to the claim of the United States.

We are then relegated to the decisions of the Supreme Court of the United States to determine whether the claim of the United States of America is prior to the claim of the State of Texas in the instant case. Upon this issue this Honorable Court is again referred to the case of Spokane County vs. United States, 279 U. S. 80, for a thorough examination of the United States Supreme Court cases, and for the decision reached by Chief Justice Taft in that case in holding that Section 3466 of the Revised Statutes of the United States gave the United States of America priority over the taxes levied by Spokane County. Chief Justice Taft after reviewing the numerous decisions of the United States Supreme Court, concludes therefrom as follows:

347 "The foregoing citations certainly make it clear that the United States has power, in order to collect its taxes and its revenues and debts due it, to confer priority for them over those of the States."

It is undisputed in the instant case that Nix was insolvent on and subsequent to the date this suit was filed. Under the plain language of Section 3466 the claim of the United States is entitled to priority over all other claims except innocent purchasers and mortgagees whose interests attached before, and without any notice of, the claim of the United States. Spokane County vs. United States, 279 U. S. 80; United States vs. Oklahoma, 261 U. S. 253; Price, Receiver vs. United States, 269 U. S. 492.

ASSIGNMENT OF ERROR NO. 1

The Court of Civil Appeals erred in holding that the claim of the State of Texas is entitled to payment prior to the claim of the United States of America.

(The foregoing assignment is Ground No. 2 of the Petitioner's Motion for Rehearing in the Court of Civil Appeals.)

PROPOSITION UNDER ASSIGNMENT OF ERROR NO. 1

It being undisputed that the taxpayer W. L. Nix was insolvent on and subsequent to the filing of this suit and that he was indebted to the United States of America in the sum of $20,907.61 for taxes and penalties due on motor fuels manufactured and sold by Nix, the United States of America is entitled to have its said claim paid prior to the claim of the State of Texas for taxes due it by Nix on motor fuel manufactured and sold by him. (Raised by Ground No. 2 of Petitioner's Motion for Rehearing in the Court of Civil Appeals.)

STATEMENT UNDER ASSIGNMENT OF ERROR NO. 1 AND PROPOSITION THEREUNDER

Nothing can be added to the undisputed facts set forth in the preliminary statement hereof, which facts are established by the opinion rendered herein by this Honorable Court on December 6, 1939, and the opinion rendered herein by the Court of Civil Appeals on March 15, 1940.
348 The Court of Civil Appeals following the reasoning of this Honorable Court as set forth in the case of State of Texas vs. B. J. Wynne, 133 S. W. (2d) 951, in effect held that the claim of the United States of America should be subordinated to the claim of the State of Texas for the reason that a holding in favor of the United States over the State of Texas would have the effect of subordinating the claim of the State of Texas to those of valid lien holders. But, as heretofore pointed out, this reasoning is wholly fallacious, because the State of Texas can be amply protected by the Court directing that its claim be paid out of the fund first set aside to the valid lien holders. As pointed out in Spokane County vs. United States, 279 U. S. 80, the relative priorities of the parties, according to the plain wording of Section 3466, Revised Statutes of the United States, could be maintained.

ASSIGNMENT OF ERROR NO. 2

The Court of Civil Appeals erred in rendering judgment in favor of the State of Texas against the United States of America,

to the extent of the remaining amount of money in the Court's hands, after the payment of all unpaid costs.

(The foregoing assignment is Ground No. 1 of Petitioner's Motion for Rehearing in the Court of Civil Appeals.)

PROPOSITION UNDER ASSIGNMENT OF ERROR NO. 2

Section 3466 of United States Revised Statutes provides in substance that whenever any person indebted to the United States is insolvent, the debts due the United States Shall be first satisfied, and it being undisputed that W. L. Nix was insolvent on and subsequent to the filing of this suit and it being undisputed that he was indebted to the United States of America in the sum of $20,907.61 for taxes and penalties due it, the debt of the United States should be first paid before the claims of the State of Texas should be paid. (Raised by Ground No. 1 of Petitioner's Motion for Rehearing in the Court of Civil Appeals.)

349 STATEMENT UNDER ASSIGNMENT OF ERROR NO. 2 AND PROPOSITION THEREUNDER

Substantially the same question is raised by the above assignment of error as is raised by Assignment of Error No. 1, and this Honorable Court is respectfully referred to the statement, argument and authorities appearing under Assignment of Error No. 1 and being applicable to Assignment of Error No. 2.

CONCLUSION

Plaintiff in error respectfully prays that writ of error be granted and that upon final hearing the judgment of the Court of Civil Appeals be reversed and the judgment of the trial Court be affirmed.

A copy of this application has been deposited with the Clerk of the Court of Civil Appeals for opposing counsel, Honorable Gerald C. Mann, Attorney General of the State of Texas, Austin, Texas, and a copy has likewise been mailed to said counsel.

Respectfully submitted.

STEVE M. KING,
*United States Attorney.*
JOHN D. RIENSTRA,
*Assistant U. S. Attorney.*

350 In Supreme Court of Texas

UNITED STATES OF AMERICA (W. L. NIX, ET AL.)

*vs.*

STATE OF TEXAS, ET AL.

Application No. 24999, From Gregg County, Second District

*Order refusing application for writ of error*

October 2, 1940

This day came on to be heard the application of Plaintiff in Error for a writ of error to the Court of Civil Appeals for the Second District, and the same having been duly considered, it is ordered that the application be refused; that applicant, United States of America, pay all costs incurred on this application. (Chief Justice Moore not sitting.)

351 In Supreme Court of Texas

*Motion for rehearing*

Filed Oct. 15, 1940

*To the Honorable Supreme Court of the State of Texas:*

Comes now the United States of America, Petitioner for a Writ of Error in the above case, and moves this Honorable Court to set aside its Order made on October 2, 1940, refusing Petitioner's Application for Writ of Error, and to grant this Petitioner a rehearing herein, grant its Application for Writ of Error, and upon final hearing, reverse the judgment of the Court of Civil Appeals, and affirm the judgment of the Trial Court, and in support thereof says as follows:

I

This Honorable Court erred in refusing your Petitioner's Application for Writ of Error, and in not sustaining its Assignment of Error Number 1, which reads as follows: "The Court of Civil Appeals erred in holding that the claim of the State of Texas is entitled to payment prior to the claim of the United States of America."

II

This Honorable Court erred in refusing to grant Petitioner's application for Writ of Error, and in failing to sustain its Assign-

ment of Error Number 2, which reads as follows: "The Court of Civil Appeals erred in rendering judgment in favor of the
352 State of Texas against the United States of America, to the extent of the remaining amount of money in the Court's hands, after the payment of all unpaid costs."

Wherefore, the United States of America prays that this Honorable Court grant it a rehearing herein, that this Court's decision on October 2, 1940, refusing Petitioner's Application for Writ of Error, be set aside, that Petitioner's Application for Writ of Error be granted, and that upon a final hearing hereof, the judgment of the Court of Civil Appeals be reversed and the judgment of the Trial Court be affirmed.

Respectfully submitted,

STEVE M. KING,
*United States Attorney.*
JOHN D. RIENSTRA,
*Assistant U. S. Attorney.*

The Attorneys of Record in this case for the Defendant in Error, State of Texas, are as follows: Honorable Gerald C. Mann, Attorney General of the State of Texas, Capitol Building, Austin, Texas; and Honorable Pat M. Neff, Jr., Assistant Attorney General, Capitol Building, Austin, Texas.

[File endorsement omitted.]

353 In Supreme Court of Texas

UNITED STATES OF AMERICA

*vs.*

THE STATE OF TEXAS ET AL.

Motion No. 14724. From Gregg County, Second District

*Order overruling motion for rehearing*

October 30, 1940

The motion for rehearing filed herein, having heretofore been presented to the Court, and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

354 [Clerk's certificate to foregoing transcript omitted in printing.]

361 In Supreme Court of the United States

*Order granting extension of time to file a petition for writ of certiorari*

Upon motion of counsel for the United States, and good cause appearing, it is ordered that the time within which the United States may file a petition for a writ of certiorari in the above entitled case (variously designated below as State of Texas et al. v. W. L. Nix et al. and M. R. Ingram v. W. L. Nix et al.) be, and it is hereby, extended for a period of sixty days from January 30, 1941.

HUGO L. BLACK,
*Associate Justice of the Supreme Court of the United States.*

JANUARY 23, 1941.

362 In Supreme Court of the United States

*Stipulation as to printing of the record*

Filed March 27, 1941

It is hereby stipulated by and between counsel for the United States and counsel for the State of Texas that in order to reduce the size of the printed record, the Clerk of the Supreme Court may eliminate the following from the printed record:

1. Exchange of Benches. (R. 6.)
2. Receiver's Report for 1933. (R. 24–27.)
3. Original claims of United States. (R. 28–35.)
4. Duplicate of amended claim of United States. (R. 41–44.)
5. Annual Report of Receiver (1934). (R. 45–48.)
6. Order Approving Receiver's Report. (R. 49.)
7. Receiver's Application to Sell Property. (R. 50–51.)
8. Order Authorizing Sale of Property. (R. 52–53.)
9. Application of Receiver to Sell Oil. (R. 53–54.)
10. Order for Receiver to Sell Oil. (R. 55.)
11. Copy of Conveyance by Receiver. (R. 56–61.)

363 12. Final Report of Receiver. (R. 62–65.)
13. Order Extending Term of Court. (R. 100.)
14. Bill of Costs. (R. 112–113.)
15. Statement of Facts and Proceedings in the District Court (Testimony and Exhibits). (R. 114–271.)
16. Motion to Stay Mandate. (R. 331–333.)

17. Order Staying Mandate (April 12, 1940). (R. 334.)
18. Motion to Stay Mandate. (R. 355–357.)
19. Order Staying Mandate (Nov. 15, 1940). (R. 358.)

FRANCIS BIDDLE,
*Solicitor General of the United States,*
GERALD C. MANN,
*Attorney General of Texas,*
GEO. W. BAPTUS,
PAT M. NEFF, JR.,
*Assistant Attorneys General of Texas,*
*Counsel for State of Texas.*

U. S. GOVERNMENT PRINTING OFFICE: 1941

Supreme Court of the United States

*Order allowing certiorari*

Filed May 12, 1941

The petition herein for a writ of certiorari to the Court of Civil Appeals, 2d Judicial District, State of Texas, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.